# Economic mobility in Canada

## a comparative study

John A. Hayes

Canada

# ECONOMIC MOBILITY IN CANADA

## A COMPARATIVE STUDY

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**John A. Hayes**

This study has been prepared by the author for the Department of Industry, Trade and Commerce, the Department of Justice, and the Federal-Provincial Relations Office of the Government of Canada. Although the study is being made available by the government, the views expressed therein are those of the author, and are not necessarily the views of the government.

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Available in Canada through

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Canadian Government Publishing Centre
Supply and Services Canada
Ottawa, Canada, K1A 0S9

| | |
|---|---|
| Catalogue No. CP 45-27/1982E | Canada: $14.50 |
| ISBN 0-660-11183-7 | Other countries: $17.40 |

Price subject to change without notice

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# ABOUT THE AUTHOR

In writing about free movement in federations, John Hayes draws upon extensive personal experience in three fields that are directly related to the subject: international trade, federal-provincial relations and the constitution, and comparative federalism. After employment in the private sector and obtaining an honours economics and political science degree at McGill University, he joined the federal Department of Finance in 1958. In 1964 he acted as Secretary to the Canadian Tariffs and Trade Committee, which was established by the federal government to receive briefs from the public concerning the positions to be taken in the "Kennedy Round" of GATT trade negotiations. He was subsequently a member of the Canadian negotiating team in those negotiations, which ended in 1967. Since 1968 Mr. Hayes has been involved in federal-provincial relations, mainly with the Federal-Provincial Relations Office of the federal government. He was closely involved in the design of the Established Programs Financing Arrangements, which brought about a major change in the form of federal financial transfers to the provinces, beginning in April 1977. He then formed part of the team of federal officials that prepared the constitutional proposals of June 1978 embodied in Bill C-60; this included acting as secretary of a cabinet committee that reviewed the proposals before they were made public. In recent years Mr. Hayes has made a specialty of the study of other federal systems.

# FOREWORD

This report relates the experience of four other federations—the United States, Switzerland, Australia and the Federal Republic of Germany—and the European Economic Community (EEC) to concerns about free movement of goods, services, people and capital in Canada.

The experience of other countries is of only limited interest in some fields of public policy. However, in the field of economic mobility there tend to be common problems. Other federations and the EEC, like Canada, have all had to strike a balance between maintaining free movement and preserving provincial or, in the case of the EEC, national autonomy. Their case law is full of what is or is not an acceptable barrier to commerce. It is true that the background factors differ: Switzerland is geographically small, and this has an influence on where the unity-autonomy balance is struck. On the other hand, in some ways it is more important for Switzerland to be a federation, with a large measure of autonomy for its provinces, than bigger countries such as Australia and the United States.

It had been intended in the preparation of this report to allocate relatively more time and space to Australia, Germany and the EEC, each of which has a relatively small number of states, or provinces, like Canada, and less to the United States and Switzerland, which have a large number of states as well as political systems based on the separation of powers. However, in the material that resulted the only important difference is that the United States study excludes information on administrative arrangements.

The bulk of the report, in Part 2, describes the constitutional provisions of these other countries, how the provisions have been interpreted by the courts, and the administrative arrangements that have been put in place by governments. Part 2 also contains an outline of the federal systems themselves and of the EEC.

In Part 1, the report attempts to identify the issues concerning free movement in Canada, notably those arising in the intergovernmental discussions of 1980, and to bring to bear on them the experience of the other federations and the EEC.

One of the conclusions of this report is that a strong argument can be made for new constitutional provisions in Canada relating to free movement. The prospects for constitutional change are not good given the new constitutional amending formula, which allows provinces to opt out of amendments that affect their powers, the separatist aims of the present Quebec government, and the lack of interest of most other provinces in preventing barriers to free movement. However, governments and circumstances change, and meanwhile the material in this report may throw some additional light on the problems caused by barriers and on the possible ways of minimizing these problems, whether by new constitutional provisions or otherwise.

# ACKNOWLEDGEMENTS

I should like to thank those officials, professors, politicians and journalists I interviewed, and the authors of the excellent written material which I consulted. I owe a special debt to those who commented on my draft text, especially Barbara Reed of the Federal-Provincial Relations Office (FPRO) of the Government of Canada, Professor Alan Cairns of the University of British Columbia, Professor Ken Lysyk, Dean of Law at U.B.C., and Professor Russell Mathews of the Australian National University, Canberra. The assistance of many others is acknowledged in the country studies in Part 2.

This report was commissioned and financed by the Federal-Provincial Relations Office, the Department of Justice, and the Department of Industry, Trade and Commerce. Financial assistance from the Centre for Research On Federal Financial Relations at the Australian National University, Canberra, made it possible for me to carry out interviews in Australia. The staff of the Vancouver office of the Department of Justice cheerfully provided indispensable logistical support; they included Alice Thompson, Margaret Taylor, Teresa Henderson, Mary Stevens and Elenore Walker. In Ottawa, Margaret Lisinski and Bernadette Emond of FPRO did the same; Pauline Benoit supervised the French translation, and Ken Mason expeditiously managed the massive task of preparing the text for publication. John Adair McLean did the editing.

The writing of the report was completed early in 1981. A few changes were made during the summer and fall to take account of court decisions and other developments such as the progress made on the patriation of the Constitution.

The views expressed are my own.

John A. Hayes
Vancouver, British Columbia
November, 1981

# PART I

## OTHER COUNTRIES' EXPERIENCE RELATED TO CANADIAN MOBILITY ISSUES

# OTHER COUNTRIES' EXPERIENCE RELATED TO CANADIAN MOBILITY ISSUES

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## SUMMARY

The kind of constitutional amendment formula that can be agreed upon in a federation reflects the degree of mutual trust and political integration of its component provinces. In November, 1981, the federal and provincial governments agreed on a formula that would be considered extraordinary in any other federation, in that it contains an opting-out provision whereby a province need not be bound by the double majority of population and number of provinces. It is quite likely that the people of the various provinces have more confidence in one another than their respective governments, but they were not called upon to express their views in a popular vote.

As with an amendment formula, the extent to which people, goods, services and investment capital are free to move within a federation also largely reflects the degree of political integration. It is no accident that in the last 15 years, when Canada's political unity has been under stress, the number of barriers to free movement has tended to increase. The increase in barriers, and the potential for many more, has led people to wonder if constitutional and other arrangements should be put in place to preserve mobility. The principal target would be barriers imposed by provincial governments.

The four other federations covered by this study, the United States, Switzerland, Australia and Germany, all have more protection against internal barriers than Canada. Canadian provinces have, for constitutional and other reasons, greater capacity to undertake independent economic and social initiatives, and therefore to create indirect as well as direct barriers to free movement, than do provinces or states in other federations.

There is also a greater tendency than in at least two of the other federations for both the federal and provincial governments to engage in or control functions that elsewhere would be left to the private sector.

For all these reasons and others, such as generally higher unemployment levels, there is a greater array in Canada of government measures that restrict or distort mobility. Newfoundland's law that requires certain oil and gas companies to give preference to hiring long-established residents of the province, would not be possible in the United States nor even in the European Economic Community. Alberta's action in 1981 that resulted in a reduction of oil shipments to other provinces has no parallel in other federations; nor has the action taken by Prince Edward Island and Saskatchewan to restrict purchases of land by people from other provinces.

There is also in Canada a greater potential for more barriers. Political constraints, deriving from Canadians' sense of community, impose a limit on how far provincial governments may go in imposing barriers; but because of Quebec separatism and regional tensions these constraints are, like the legal ones, weaker in Canada than in the other federations.

Whether the existing and potential problems are serious enough to warrant new constitutional provisions and other measures, as recommended by a number of economists and constitutional task forces, is a matter of judgment, but a strong case can be made that they are. There are three arguments for more strongly protecting free movement: economic, national unity, and political.

It is conceded by pretty well everybody that barriers to free movement involve economic costs, whatever the size of the market. Among the five federations, Australia and Canada can least afford the economic balkanization that results from internal barriers, because their manufacturing industries serve mainly a domestic market that is too small to be fragmented without serious consequences. In Australia, there are a number of barriers, as in all federations, but the constitutional and other protections against them getting out of hand are stronger than in Canada.

There are regional tensions in Australia, but no serious worry about national unity. Canada is alone among the five federations on this score. Barriers weaken unity; provisions that prohibit barriers cannot ensure unity but they can help preserve and promote it.

Finally—but this is more controversial—additional protection for free movement could make a useful contribution to setting salutary limits on the role of governments in the ownership and control of business enterprises. The federal and provincial governments are active in pursuing the political objectives of nation-building and province-building respectively, objectives which frequently conflict. To achieve these objectives governments acquire control of commercial enterprises, favour local firms, or prevent takeovers of local firms, and so on. Enterprises that are under government ownership or influence are not as easily subject to the laws of competition as others, and this has economic effects. There are also political effects, in that when decisions are taken out of the market and into the political realm there is increased stress on the political system and on federal-provincial relations.

If it is accepted that one or more of these three arguments for additional protection for free movement constitute a strong case, should the added protection rely mainly on new constitutional provisions or on special arrangements negotiated among governments?

There are two reasons why new constitutional provisions are desirable. First, the odds are against adequate arrangements being worked out by intergovernmental negotiation. Most provinces (Ontario is a notable exception) have little interest in reducing barriers, as was apparent from the discussion at the First Ministers' Conference in September, 1980. They are not greatly worried about retaliation from other provinces because of the nature of Canada's internal trade. Many of them rely more on exports of basic products to other countries than they do on shipments to other provinces of goods susceptible to barriers. Nor are provincial governments accountable to voters outside their borders who are affected by the barriers they create.

Secondly, even if there were sufficient interest on the part of the provinces, and if adequate provisions could be agreed upon, the agreement would be less stable than rules entrenched in a constitution. The counter-argument is that such rules would be less flexible. The essential question is, therefore, what things should not be the subject of continual negotiation? On this, opinions will differ, as they have over the content of a Charter of Rights and Freedoms, where the issue of flexibility also arises. The experience of other federations suggests that in Canada we could go a good deal further than we have in entrenching rules in the Constitution, particularly since our mobility problems are more serious.

An alternative to entrenched rules would be to have a constitutional provision that could be invoked at the option of governments to make intergovernmental agreements binding. This alternative assumes that agreements of satisfactory coverage could be negotiated.

If new constitutional provisions were to be introduced in the future they could justifiably include the following elements: stronger mobility rights; additional federal powers over interprovincial trade and related matters such as competition policy; and a strengthened section 121 free-movement guarantee for goods, services and capital. It is doubtful whether the provinces should be given specific authority over intraprovincial trade, as some people have recommended, because of the frequent difficulty in distinguishing it from interprovincial trade. Judicial interpretation of other provincial powers already imposes major limitations on the reach of the federal power over trade and commerce.

The mobility rights escape clause agreed on in November, 1981, for use by provinces with above-average unemployment is unknown in other federations and in the EEC. It will confer respectability on measures that are generally regarded as incompatible with the notion of common citizenship.

If the section 121 guarantees were strengthened, there are several reasons, set out in the attached paper, why court decisions based upon it should not, as suggested by some provinces, be made subject to override by a federal-provincial political body. If flexibility is needed, Parliament could be given limited authority to legislate exceptions to the application of the guarantee.

Other federations, including those where resources are important, have no special provincial trade powers relating to natural resources. The provinces' request for such powers and the federal government's acquiescence can be understood only in terms of *realpolitik*.

Any new constitutional provisions relating to free movement are likely to leave the provinces wide scope for pursuing independent policies, a scope that would probably continue to be wider than in the other federations. This is for two reasons: the present extent of provincial autonomy, and the power given to provinces in the new amendment formula to resist any serious weakening of that autonomy. Provinces, therefore, would continue to be able to compete with one another in offering different programs and policies to attract new residents and new industry. Nevertheless, the prospects for their agreeing to early changes in the Constitution are not bright.

Even in the absence of constitutional changes there is much that can be done. In Australia, where constitutional amendment is difficult, the federal and state governments have devised a co-operative scheme that will provide a common companies and securities law across the country. In the EEC there are numerous matters that are the subject of intergovernmental agreement, although unanimity is usually required. In Canada, given the will to prevent barriers and to undertake the arduous task of reaching intergovernmental agreements, one could live with the fact that such agreements are less stable than constitutional rules.

In the short term, it is possible that provincial governments—the present Quebec government might be an exception—may come to be concerned about the political and economic costs of barriers. Pressure on them by affected Canadians could play a role, as it has in public discussion of the need for a charter of fundamental rights. The provincial governments and Canadians generally will give free movement more support if they believe that federal policies and spending are regionally equitable and that a greater diversity of employment opportunities is being promoted in the outlying provinces. Provincial governments will probably want a bigger say in federal decisions in return for action to reduce or prevent barriers. Better performance for the economy as a whole will weaken the incentives to erect protective internal barriers.

In the longer term, progress in preventing barriers will tend to go roughly in step with progress in promoting national political unity. Those who hope for a more united country will want to hasten the day when Canadians return to the sentiments expressed in a U.S. Supreme Court decision during the depression of the 1930s. The court held that a state has no right to promote its own economic welfare at the expense of the rest of the country by restricting interstate trade, because the constitution had been "framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in unity not division."

## BARRIERS TO FREE MOVEMENT IN CANADA

This comparative study is mainly about the provisions in federal constitutions that protect the freedom of movement across provincial boundaries of people, goods, services and investment. There are few provisions as important as these. The Australian free-trade guarantee, section 92, is "seen more fundamentally than any other as being philosophically behind the reasons for federation." It is also the most litigated section in the Australian Constitution. The U.S. interstate commerce clause is "the principal legal foundation for the efforts to build and sustain a national economy."

Such provisions are important because they affect the following:

- economic development, the international competitiveness of domestic businesses, and national prosperity
- political integration
- the balance of responsibilities between the federal and provincial governments
- the basic rights of individuals and the commercial freedom of business firms.

The federal and provincial governments in 1980 discussed whether there should be new provisions to protect free movement from barriers that result from government action. What are these barriers?

In the last few years, the following provincial actions are among those that have attracted nation-wide attention.

- Prince Edward Island passed a law restricting the right of Canadian individuals and companies resident outside the province to own land in the province.
- A Quebec law imposed restrictions on the mobility of construction workers within the province and on such workers coming into the province from outside.
- A Newfoundland law required that certain oil and gas companies must give preference to hiring Newfoundland residents and to purchasing local goods and services.
- A Nova Scotia law empowered the government to require oil companies to give employment preference to Nova Scotians.

- British Columbia intervened to block a takeover of a local forest products company by an out-of-province company, and Quebec did the same regarding the takeover of a local financial company.

- Alberta, in 1981, cut back its production of oil to bring pressure on the federal government in negotiations about energy policies and prices.

Beyond these specific actions that impede free movement and fragment the Canadian common market there are continuing provincial government policies that have the same effect. They include preferences for locally-produced goods and services, and regulations that make it difficult for professionals and sometimes workers to take up employment in the province.

There are also federal government measures that fragment the market. These include a preference for hiring northern residents for work on the Yukon pipeline; a requirement that recipients of regional development grants employ as many local residents as possible; and tax credits for investment and employment which are higher for the poorer regions.

Do these provincial and federal measures, and others not mentioned, amount to a serious problem that warrants new constitutional provisions?

A number of observers are concerned about recent trends. Professor A.E. Safarian in his 1973 study concluded "that constitutional revision is necessary to guarantee more fully the common market and economic union basis of the federal state. This basis is susceptible to considerable erosion and is incapable of adequate realization in the absence of a strengthened guarantee. The ultimate result is a loss to all Canadians."[1]

Judith Maxwell and Caroline Pestieau noted in a 1980 study that "a competitive approach to economic policy was observed in all Canadian provinces during the 1970s. The predictable result has been that policies have tended to offset each other, and the operation of the Canadian market has been impaired."[2]

Several recent constitutional studies have included a review of the economic union. Most of these studies have concluded that the maintenance of the union is of great importance and that existing constitutional provisions are inadequate. Typically, they recommend a strengthening of federal powers over interprovincial and international commerce and a strengthening of the constitutional guarantees for the interprovincial free movement of people, goods, services and capital; jurisdiction over trade and commerce within a province would be reserved to the provinces.

In September, 1980, a conference of federal and provincial first ministers tried without success to reach agreement on a package of constitutional changes that included changes relating to the economic union. We shall now look at the positions taken at the conference.

## POSITIONS: FEDERAL AND PROVINCIAL

Two items on the conference agenda were directly concerned with free movement: "Powers over the economy," a discussion requested by the federal government, and "Resource ownership and interprovincial trade," a subject raised by the provinces. The first item focused on constitutional provisions to ensure the free movement within Canada of goods, services, people and capital; the second was concerned with provincial control over production of, and trade in, natural resources.

The draft Charter of Rights and Freedoms proposed by the federal government, and discussed under a separate agenda item at the conference, also touched on the question of mobility. It included a section on the rights of people to move from one province to another, and to acquire property and pursue a livelihood in any province. It included other sections on language rights that could also affect mobility. However, the discussion of mobility was concentrated under the two agenda items mentioned above, and particularly under the first.

### POWERS OVER THE ECONOMY

The federal government proposed a strengthening of the existing guarantee in section 121 of the British North America Act, an affirmation of the federal power under s. 91(2) over trade and commerce, and an extension of federal powers regarding competition and product standards. The federal proposals are reproduced in annex 2 of this study.

The case for strengthening the section 121 guarantee is that its coverage is quite limited. It prevents the levying of customs duties at provincial borders on goods produced in Canadian provinces; beyond that its reach is uncertain. It does not apply to the movement of people, services or investment capital.

Ontario was the only province that gave substantial support to the overall federal position. It favoured strengthening the s. 121 guarantee, but appeared to back off from this during the discussion. The position of the other provinces generally was that the existing or potential problems for free movement were not serious enough to warrant new constitutional provisions; that the federal proposals would unduly increase federal powers; that most barriers are better handled by intergovernmental negotiation than by court interpretations of constitutional guarantees; and that the effect of increased federal powers and strengthened guarantees would be to reduce substantially their powers to intervene in the economic life of their particular province.

All of the provinces were prepared to agree to the insertion of a non-binding statement of principles and co-operation in the Constitution. Prime Minister Trudeau stated that a statement of principles was not an adequate method of resolving the question.

The following paragraphs go into more detail on the positions taken by governments, with a view to identifying the principal issues.

In a paper tabled at one of the ministerial meetings that preceded the conference, the federal government set out the reasons behind its proposals.[3] The paper included this passage:

> The GATT agreements often impose more discipline upon sovereign states bound by them than the Canadian Constitution does upon the provinces. The same applies to the Treaty of Rome: Its provisions to ensure . . . free movement . . . place much greater constraints upon member states than do the provisions of our Constitution upon our two orders of government. As for the other federal constitutions examined in this paper, all, without exception, guarantee economic mobility throughout the territory of the federation by means of specific provisions. . . . We believe . . . that the Constitution of Canada should guarantee economic mobility within the country through provisions at least as effective as those found in arrangements between sovereign states; arrangements such as the GATT and the Treaty of Rome.

At the conference, Justice Minister Jean Chrétien pointed out that international trade barriers are coming down. He said that the small Canadian market ought not to be fragmented, and that firms would have difficulty in facing international competition if they could not face competition from elsewhere in Canada.

Ontario's initial position at the conference was set out in a paper and a draft constitutional text.[4] The paper noted that "virtually every government has taken actions—and the trend has increased in recent years—that have the combined effect of weakening and balkanizing the Canadian economic system." In Ontario's view, the expansion of the s. 121 guarantee "appears to be the most logical and important area for us to concentrate on. . . . We believe there should be a role for the courts, but we believe a forum representing our governments should also be considered." Such a forum should include representatives of both the federal and provincial governments.[5] "But we do not believe such a forum is enough by itself to protect the economic union and the rights of citizens to have recourse to the courts when they believe their rights are being infringed."

At the conference, Premier William Davis appeared ready to accept much less, saying that an enforceable constitutional provision would perhaps not be necessary if first ministers could agree on an intergovernmental mechanism and supporting guidelines. Later, he seemed willing to accept no more than the statement of principles.

Quebec's finance minister, Jacques Parizeau, made two interventions in the discussion. He said that the proposed amendments to s. 121 and s. 91 were unnecessary and unacceptable to Quebec; they would abolish the economic powers of the provinces. The right of both orders of government to take economic development initiatives must be recognized. He defended measures taken by Quebec to discriminate in favour of its citizens. "To govern is to discriminate," he said. It should not be assumed that discrimination by the provinces was balkanizing, and that discrimination by Ottawa was not. Provincial action to prevent takeovers prevented undesirable economic concentration. In the United States and the EEC, there were government preferences for local suppliers. Mr. Parizeau acknowledged that there were specific problems, such as in competition policy, securities regulation, and government borrowing in foreign markets. Any action should address such specific problems rather than attempt broad abstract solutions. Even the Saskatchewan proposal to prohibit all but necessary discrimination worried him, he said.

Premier Richard Hatfield of New Brunswick said his province has raised few barriers. Purchasing preferences was one. But he was concerned that a more aggressive prosecution of free movement would endanger the fragile economy of his province. He would work toward free movement, as long as he was sure that it would not cost anyone his or her job.

Premier William Bennett of British Columbia said that free movement was a noble objective, but easier to achieve in a more compact country. The principle should not be used to prevent his province playing a strong economic role in Canada. Federal policies had discriminated in favour of the industries of Central Canada. It was unrealistic to expect that national policies would take care of areas that had suffered from national neglect. Actions taken by his government had helped British Columbians without hurting other Canadians. The steps taken to forestall the takeover by Canadian Pacific Investments of MacMillan Bloedel, the forestry products company, were to prevent the province's most important resource from being dominated by a single company. Also, it was legitimate to provide incentives for the people of B.C. to buy ownership of industry in the province.

Education Minister Frederick L. Driscoll of Prince Edward Island said the problems in the way of free movement were not as serious as suggested by the federal government. Canada never had been a free market economy, and the federal government, which had itself interfered with free movement, now was saying the provinces should not interfere. His province was not ready to surrender to the courts or to Parliament "as presently constituted" its freedom of action regarding certain economic initiatives. He defended vigorously P.E.I. restrictions on ownership of land by Canadians and others not resident in the province.

Alberta's premier, Peter Lougheed, said that existing problems were not serious enough to warrant the federal proposals. If other provinces favoured the adoption of a statement of principles, of the kind proposed by Saskatchewan, Alberta would agree.

Premier John M. Buchanan of Nova Scotia said the need for regional development must be recognized in a tangible way, as must the economic differences between provinces. Nova Scotia meanwhile would maintain its 10 per cent preference for purchases from local suppliers, and the government was "proud" of its preference for suppliers from the Maritime provinces generally. Also, the province's industrial incentives were important. A local purchasing preference was the only way to cope with "dumping" from Central Canada; for its part, Nova Scotia had little interest in the Ontario market, because it was too far away.

Newfoundland's premier, Brian Peckford, stated that it was unnecessary to give the federal government or the courts additional powers. Newfoundland had to catch up, not only through regional development programs but also through affirmative action in favour of its citizens and through better prices for its resources. The agreement between the federal and Nova Scotia governments about investments by Michelin provided for a local labour preference. The judicious use of such affirmative action and of local purchasing preferences should be compatible with economic union. Newfoundland was prepared to see a statement of principles inserted in the Constitution. The referral of derogations to a political body was "cumbersome" but his government was willing to look at that proposal.

The Government of Saskatchewan had tabled two documents outlining its position;[6] it also had submitted a draft section 121 that would, without altering legislative powers, commit all governments to maintaining and improving the economic union.[7] Premier Allan Blakeney during the conference discussion modified the position. It is set out in the following paragraphs.

Saskatchewan believed it was undesirable to entrench personal mobility rights in a charter. The provisions proposed by the federal government would invalidate the province's restrictions on the ownership of farmland by non-residents, restrictions that were designed to help preserve Saskatchewan's way of life.

The federal proposals taken together would expand federal jurisdiction at the expense of the provinces. Regarding competition, Saskatchewan had misgivings about the federal proposal, but was not opposed to it. Saskatchewan accepted the proposed federal paramount jurisdiction over product standards.

The effect of extending s. 121 to services and capital was uncertain but could result in a serious restraint on both federal and provincial capacity to regulate the economy. The Saskatchewan legislation on medicare and automobile insurance conceivably could have been forestalled by such a provision. The federal government proposal that Parliament would be able to avoid the s. 121 guarantee in relation to a matter declared by Parliament to be of an overriding national interest should be paralleled by a similar option for the provinces, for matters of overriding provincial interest.

Saskatchewan believed that the focus of the federal proposals on explicit barriers was misplaced.

> The big economic levers, such as tax rates, tariff and transportation policies, would not be brought into question. But, these major economic levers are precisely the forces having the greatest impact on the mobility of resources and products in Canada. And, the richest provinces have the greatest capacity to use such instruments to attract business away from other provinces. The only defence available to a small province may be to take action which creates barriers to protect their competitive position within the economic union. . . .

Governments would therefore not solve the problem by a constitutional provision defined in terms of provincial boundaries. If some measures were made more difficult, provinces would increasingly resort to those that were not prohibited, such as tax incentives.

Economic mobility, in Saskatchewan's view, was an area with which the courts were ill-equipped to deal. Responsible governments could not relinquish to the courts their job of managing the economic union. Saskatchewan therefore was proposing a constitutional provision that would commit governments to the effective operation of the economic union, without limiting legislative powers.

Manitoba, in a paper tabled at the conference,[8] and in statements by Premier Sterling Lyon and the Minister of Finance, Donald W. Craik, said it opposed "at least at this time" the proposed amendments to sections 91(2) and 121. The "tremendous increases" in federal powers would reduce the power of the provinces to act affirmatively. Manitoba, for example, had "been striving to be able to offer our people that same breadth and diversity of opportunity that people in Central Canada have been able to take for granted over the years." Manitoba was concerned about the so-called barriers to trade that were growing up between provinces, but the barriers had arisen because there was no appropriate vehicle for harmonizing the economic and industrial development efforts of the 11 governments. The barriers should be made not illegal, but obsolete through intergovernmental co-operation, such as on the purchasing requirements associated with major capital projects. Manitoba's hydro machinery faced "an impossible 10 per cent" purchasing preference established by the British Columbia government. Manitoba could consider Saskatchewan's proposal for a general commitment to economic union.

Towards the end of the discussion of this agenda item, Senator H.A. Olson, speaking for the federal government, said it appeared there was a recognition by governments that there were problems in this field and that they could get worse. He noted that the federal government was most concerned about barriers to mobility where the provincial border is used as the basis for discrimination. He asked whether all governments could agree that there should be a constitutional provision to refer derogations from mobility requirements to some kind of a tribunal, possibly a new second chamber. The only response to this was indirect. Finance Minister Parizeau of Quebec said that provincial discrimination was not the cause of Canada's loss of international competitiveness, and that one must not use sledgehammers to kill flies, and Premier Davis of Ontario asked whether governments could agree on a simple commitment or statement of principle. Prime Minister Trudeau said that the latter alone was unacceptable.

## RESOURCE OWNERSHIP AND INTERPROVINCIAL TRADE

At the conference, there was little discussion in public on this item. The prime minister, in a tabled paper, reviewed the positions taken by governments, as follows:[9]

1. All provinces want the Constitution to provide clear recognition of provincial ownership, and of provincial jurisdiction over the development and management of non-renewable and forestry resources and electrical energy. The federal government accepts this, in principle.

2. Seven provinces favour giving provinces concurrent jurisdiction over exports to other countries, subject to federal paramountcy, and

concurrent jurisdiction over shipments to other parts of Canada, subject to federal intervention only in cases of "compelling national interest." At least one province would place an even greater limitation on federal power to intervene in interprovincial movements. The federal government does not agree that the provinces should have concurrent power over exports, because it might mean that Canada would no longer speak with one voice in trade relations with foreign countries. It agrees that provinces should have concurrent power over interprovincial shipments, subject to federal paramountcy unqualified by any test of "compelling national interest."

3. Eight provinces favour a provincial power to levy indirect taxes on resources, provided such taxes would not discriminate between resources shipped out of the province and resources retained within it. The federal government accepts this proposal.

4. The definition of the term "primary production," determines the scope of "resources" for the purposes of the new constitutional text. Most provinces favour a definition which would include products resulting from refining and simple processing, but not manufacturing. The federal government accepts this proposal.

There was thus only partial agreement on this agenda item.

The conference as a whole produced no consensus on the substance of most of the subjects discussed nor on how to proceed with the constitutional review. In early October, 1980, the government introduced in Parliament a proposed resolution for Commons and Senate addresses to the Queen respecting the patriation to Canada of the Constitution. The resolution contained a Charter of Rights and Freedoms, including mobility rights and language rights, and various other provisions to be incorporated in a new Constitution, notably an amending formula.

Later, the government added to the text of the resolution a new section 92A of the British North America Act that would give the provinces additional powers over resources. The text conformed with what the prime minister, at the conference, had said the federal government was prepared to accept.

The text of a subsequently modified mobility rights provision and of section 92A, as adopted by the House of Commons on December 2, 1981, are given in annex 3 to this report.

# FREE MOVEMENT IN OTHER FEDERATIONS AND THE EEC

The following is a summary, describing free movement in other federations and in the EEC. More detailed descriptions are contained in Part 2 of this report.

## THE UNITED STATES OF AMERICA

The United States is, in terms of purchasing power, the world's largest homogeneous market. The formidable legislative powers of Congress have played a major role in helping to create that market. Above all, the interstate commerce clause of the U.S. Constitution has proved a potent source of restraint on state barriers; it also underlies federal regulation of several policy areas that affect free movement, including labour relations, the securities industry, competition policy and communications. Congress chooses not to regulate some fields, leaving them to the states, such as certain aspects of interstate banking. But in general, it may be said that if Congress chooses to act it may constitutionally do so with regard to almost any barriers to free interstate movement. This probably includes local purchasing preferences and locational incentives for industry, both of which are now used by most states.

## SWITZERLAND

Government intervention in the economy is more frowned upon in Switzerland than in Canada. For this reason, and because of certain constitutional guarantees, the federal and provincial authorities, but particularly the latter, have less scope than their counterparts in Canada to introduce measures that impede free internal movement. The creation of internal barriers is, in any case, deterred by the fact that Switzerland is geographically small. A sizeable number of people live in one canton and work in another. There are, nevertheless, especially in times of economic recession, some local purchasing preferences and locational investment incentives given by provincial and municipal governments.

Most of the legislation affecting trade and industry is federal. In a number of other fields, too—taxation is an exception—the Swiss federal authority has, relative to the provinces, more legislative power than ours. These include labour, social security, education, highways and civil law, all of which have an indirect effect on free movement.

## AUSTRALIA

Among the federations, Australia is the one that most closely resembles Canada, but the federal (Commonwealth) government has relatively more power than ours, largely because it dominates the states financially. The domestic manufacturing industry serves a small, protected market, and for this reason barriers to internal free movement are potentially harmful. However, the guarantee of free movement in section 92 of the Constitution has been interpreted by the courts in a way that makes it difficult for states to erect barriers. The Commonwealth government, too, is prevented by section 92 from certain kinds of interference in the Australian common market.

The states offer local purchasing preferences, locational incentives for industry, and discriminatory freight rates on their railways, but the overall potential for state interference in the common market is less than it is in Canada, because of section 92 and the wider reach of Commonwealth powers over trade, corporations and industrial disputes. The Commonwealth has the power to disallow state subsidies for production or export. It probably also could use the external affairs power to legislate against any state purchasing preferences that contravene the GATT treaty.

## THE FEDERAL REPUBLIC OF GERMANY

The problems in the way of free movement in Germany are less intractable, and the constitutional weapons to preserve it more powerful, than is the case in Canada. If the average person hears of barriers to free movement he feels it must be something to do with the EEC, not with the internal market.

Legislative powers over internal free movement are almost exclusively federal; the only major exception is the field of regional development, where incentives and spending do, to some extent, affect the distribution of investment. Even in this field there is a joint federal-provincial scheme, so that any harmful competition between provinces is confined to areas outside the joint scheme. There is no serious political controversy, comparable with what there is in Canada, about the regional distribution of industrial investment. The federal powers that deal explicitly with mobility are reinforced by the fact that most economic and social legislation is federal, thus reducing the scope for provincially-legislated barriers that may affect mobility indirectly.

## THE EUROPEAN ECONOMIC COMMUNITY

The EEC is somewhat more than a simple confederacy or alliance, and somewhat less than a full-fledged federation. Lacking a federal authority and a common currency, and with a large measure of autonomy reserved to member states, much of the community's effectiveness depends on the energetic supervision by the Commission of member states' adherence to the treaty rules, on the interpretation of the rules by the Court of Justice, and on the co-operation and goodwill of member states.

The right of individuals to work in another member state free from discrimination is protected by the courts. The free movement of goods is legally protected. Government-owned or controlled enterprises are also subject to the rules. Government aid to industry is supervised by the Commission.

The concern to preserve competition both between and within member states pervades the treaties and the decisions of the court. The Commission is given extensive authority in the field of competition policy.

Harmonization of national policies and laws is pursued wherever differences have an effect on manufacturers' costs, so that even where differences are allowed by community law an effort is made to remove those that harm the functioning of the common market. Since unanimity of member states is usually required and many things need harmonizing, the result is that the Commission finds itself on something of a tread-mill. Vast effort now goes just into maintaining the effectiveness of existing agreements, let alone the negotiation of new ones.

Considering the problems, much has been achieved to establish and preserve free movement within the EEC, but it is widely acknowledged that some community rules are circumvented. Because the supervisory resources of the Commission are limited and court cases take time, member states often are able to get away with infringements in the short run, and the short run is frequently long enough to meet their particular political difficulty.

## COMPARISON WITH CANADA

The following table compares Canadian constitutional provisions relating to free movement with the provisions in the four other federations. The other federations all have mobility rights for people and wider federal powers than in Canada, whether they be powers relating directly or indirectly to free movement.

There are two broad approaches taken by the other federations. In the case of Germany and the United States, there are wide exclusive federal powers, which, so far as state legislation is concerned, have the same effect as a free-trade guarantee in that states may not legislate barriers in the exclusive field. In the case of Australia and Switzerland there are concurrent trade powers, with federal paramountcy, operating in tandem with a strong guarantee.

## COMPARISON OF CONSTITUTIONAL PROVISIONS

| | Scope of mobility rights for individuals. | (1) Scope of free trade guarantee.<br>(2) Whether federal authority is bound by the guarantee. | Scope of powers directly affecting trade and mobility. | Scope of federal powers indirectly affecting mobility.<br>(1) Compared with Canada<br>(2) Examples. |
|---|---|---|---|---|
| U.S.A. | Moderate | (Exclusive federal interstate jurisdiction is equivalent to a guarantee, so far as the states only are concerned.) | Exclusive federal powers over interstate trade extend well into intrastate. State trade powers largely confined to "police" regulations. | (1) Wider<br>(2) Labour, securities, conditional grants. |
| SWITZERLAND | Wide | (1) Wide<br>(2) In principle, yes; but there is broad authority to override the guarantee. | No inter-intra distinction. Concurrent, with federal paramountcy. Wider federal powers than in Canada. State trade powers largely confined to "police" regulations. | (1) Wider<br>(2) Civil law, labour, social security. |
| AUSTRALIA | Moderate | (1) Wide<br>(2) Yes, e.g., agricultural marketing and nationalization. | Interstate: concurrent, with federal paramountcy. Wider federal powers than in Canada. Intrastate: exclusively state jurisdiction. | (1) Somewhat wider<br>(2) Corporations, industrial disputes, treaties, conditional grants. |
| GERMANY | Wide | (Exclusive federal jurisdiction is equivalent to a guarantee, so far as the states only are concerned.) | No inter-intra distinction. Exclusive federal authority, much wider than in Canada. | (1) Much wider<br>(2) The economy, labour, civil law, securities. |
| CANADA | Rights of moderate scope are planned. | (1) Narrow; supplemented by narrow exclusive federal trade jurisdiction.<br>(2) Yes | Exclusively federal, but narrowly interpreted. Courts have reserved intraprovincial authority for the provinces. | |

## THE MAIN ISSUES IN CANADA

The overall question discussed at the September, 1980, conference was as follows: is there a serious problem in Canada, with regard to free movement, and, if so, what is the best way to deal with it? This question breaks down into a number of sub-issues:

1. Is there an existing or potential problem with regard to free movement in Canada serious enough to warrant new constitutional provisions that would go beyond a non-binding commitment to intergovernmental co-operation?
2. If so, should these provisions take the form of
   (a) an increase in federal powers?
   (b) mobility rights for people, and a strengthened section 121 guarantee of free movement?
   (c) a combination of (a) and (b)?
   (d) the addition of a political mechanism that would allow governments to infringe a strengthened s. 121 guarantee?
3. Should a section 121 guarantee operate with regard to the criterion of discrimination or some other criterion?
4. Should federal legislation be subject to mobility rights and a section 121 guarantee?
5. What provincial derogations from mobility rights or a section 121 guarantee should be permissible?
6. What constitutional provisions or administrative measures are required to harmonize legislation not prohibited by mobility rights, or a section 121 guarantee, but which impede the operation of an economic union?
7. Should there be special interprovincial trade provisions to protect provincial autonomy over natural resources?
8. Should a province be able to interfere with free movement in order to reduce regional disparities within the province?

# THE EXPERIENCE OF OTHER COUNTRIES RELATED TO THE ISSUES TO BE RESOLVED IN CANADA

The experience of other countries regarding free movement cannot provide definitive answers to questions about how we should proceed in Canada, but it can provide a broad perspective that should help Canadians to find the right answers.

1. Is there an existing or potential problem with regard to free movement in Canada serious enough to warrant new constitutional provisions that would go beyond a non-binding commitment to intergovernmental co-operation?

Most task forces and economists who have studied this question in recent years conclude that there should be such new provisions. The federal and Ontario governments are also of this opinion, but most provinces say the problem is not that serious.

This paper will argue two propositions: first, that the problem of barriers in Canada is more serious than in the other four federations, both in economic and political terms; and second, that while it is a matter of judgment whether existing and potential barriers are serious enough to require new constitutional provisions, a strong case can be made that they are.

The extent to which there are actual barriers to mobility in a federation depends not only on the constitutional provisions which specifically relate to mobility, although these are very important, but also on other factors. These other factors include the amount of legislative, financial and political power that is enjoyed by the component provinces or states; the extent to which society in general expects or tolerates intervention in the economy by any level of government; the existence of regional sentiment and divisive tensions; the geographical size of the component provinces; the economic size of the total market that is accessible to producers; the extent of the constituent provinces' dependence on internal trade, and so on.

It so happens that in Canada, more than in the four other federations covered by this study, most of these factors combine to produce a situation which is conducive to the erection of barriers. For example, it is in Canada that the constitutional provisions relating specifically to mobility offer the least protection against barriers, whether federal or provincial, and where the capacity of the provinces to initiate and pursue economic policies of their own is greatest.

In the other federations there are circumstances that inhibit existing or potential barriers. In the United States, they include basic mobility rights, the massive power of Congress over interstate trade, and other federal weapons such as the power to bring pressure on the states by attaching virtually any conditions to federal grants. Also, there is less of a tradition of government intervention. In Switzerland, government intervention in economic matters is kept to a minimum; other important factors are the basic mobility rights, the extent of federal legislative power, and the small size of the country. In Australia, the free trade guarantee in the Constitution plays a major role, and there are federal powers that can be used directly or indirectly to preserve mobility. In Germany, the federal authority has exclusive powers over freedom of movement; the provinces have some leeway to create barriers in the course of their regional development activity, but most of the locational incentives offered by the provincial governments are brought within an agreed federal-provincial scheme.

It is true that there are barriers in the other federations. Locational incentives for industry and provincial government purchasing preferences for local suppliers are common to all, although in Germany the latter hardly exist. Professional people have difficulty in most federations moving from one province to another, but the difficulty is greater in Canada and the United States than in the other three. However, Canada has a greater array of barriers than the other federations, and some of them seem to be peculiar to this country, such as Newfoundland's employment preference for long-established residents, Alberta's 1981 cut-back of its oil production resulting in reduced shipments, and provincial restrictions on the purchase of land by other Canadians. Canada also has a greater potential for more serious barriers.

This might not be something to worry about were it not for two reasons. One is economic; the other is political.

First we will look at the economic reason. Of the five federations covered in the mobility study, only Canada and Australia are handicapped economically by having a small market for their manufactures. The United States is itself a huge market. Germany has a much larger market than Canada and, in addition, belongs to the EEC. Switzerland has an agreement with the EEC that gives it duty-free access to the community for its manufactured exports; it also is a member of the European Free Trade Association. If the small markets of Canada and Australia are further fragmented by internal barriers, the competitiveness of their manufacturing industry is likely to suffer severely. In other words, while there are some barriers in all five federations, Canada and Australia are least able, economically, to afford them.

In Australia, unlike in Canada, there is a powerful free trade guarantee (section 92) and other provisions that are more protective of free movement such as federal jurisdiction over corporations and interstate industrial disputes. The Commonwealth has the power to disallow certain state subsidies, and it probably has the power to legislate against some state purchasing preferences. With regard to state-imposed barriers beyond the reach of free movement guarantees or federal jurisdiction, the Commonwealth government has various means at its disposal to bring pressure on the states should it choose. It has a monopoly of income taxes and dominates the states financially, and in effect it controls state borrowing through its influence on the Australian Loan Council. This includes the borrowing that is done in foreign markets to finance development of the states' major resource projects. Also, in Australia it is more typically the Commonwealth government that will turn off the tap than a state government. The Commonwealth has used its authority over exports to control the development of state resources.

In Australia, as in the other three federations, there are no strains on national unity comparable with those we have in Canada. This brings us to the second reason for believing we have a more serious problem: the political one.

Economic and political unity go hand in hand. The economic unity of the EEC has been promoted expressly to increase the political integration of countries that formerly warred with one another. The reverse also happens: countries come together to form a federation so that they can enjoy the benefits of an economic union.

The strong link between the two kinds of unity is shown by the experience of the other federations as well as of the EEC. The basic constitutional provisions that guarantee free movement are recognized to be fundamental in promoting a sense of common citizenship. With common citizenship should go equality of economic opportunity throughout the federation. The EEC court has observed that the removal of trade barriers within the community made member states more dependent on one another, and that this interdependence implies mutual obligations among the members. These mutual obligations exist in even greater measure in full-fledged federations such as Canada. Internal barriers weaken the sense of national community and mutual obligation among the provinces. They therefore promote political as well as economic weakness and disunity.

So one concludes that the existing and potential problem of free movement is more serious in Canada than in other federations, looking at both the economic and political unity aspects.

The question of whether the problem in Canada is serious enough to warrant additional constitutional protection is not the principal focus of this study; that focus is rather what might be the best kind of provisions assuming that the need for additional constitutional protection has been demonstrated. Nevertheless, a strong argument can be made for additional protection, on economic, national unity and perhaps also on broad political grounds, and there are practical reasons why it should take constitutional form.

The economic argument has been made by Professor Safarian and others. Perhaps more empirical evidence that serious economic harm has been done by barriers is needed, but since the damage is often diffused and long term, its existence is difficult to demonstrate. The potential is undeniable.

The national unity argument has been noted. The extent of provincial autonomy is considerable and is likely to remain so, in part because of the new constitutional amendment formula agreed upon in November, 1981, and in part because of Quebec separatism. The more autonomy, the greater the likelihood of barriers.

Finally, there may be a political argument for greater protection. The broad, and possibly increasing, government control of the economy, both federal and provincial, that now exists has consequences for our political system that probably are unfortunate. Government ownership and control of commercial enterprises makes them less subject to market forces and probably lessens competition and the mobility of goods and investment.

Several provinces have decided they ought to own or control not only natural monopolies but also their most important industries. Newfoundland wants control of the fisheries; Alberta argued in 1980 for complete control of oil and gas, including control over interprovincial and international trade in these commodities; Saskatchewan has bought into the potash industry; Quebec is acquiring a large asbestos producer; and British Columbia has thwarted an outside takeover of its principal forestry company and has set up the B.C. Resources Investment Corporation whose policy appears to be the acquisition of provincial firms or resources. Prince Edward Island prevents residents of other provinces from buying land in excess of individual requirements.

This province-building activity is paralleled by nation-building. The new national energy policy is an example. An element of federal-provincial competition has probably been present in some federal and provincial acquisitions.

When decisions about the allocation of economic resources are taken out of the free market and into the realm of politics an additional burden is placed on the political system. Our federal system is already under stress. Increased government control, however much, in other respects, it may serve useful purposes, can only add to it.[10] Possibly one reason why the Swiss federal system works well is the low level of government intervention in investment decisions.

Greater protection for free movement is not the only way to meet this broad political problem, but it can help. Australia's free trade guarantee may not be an ideal model but it has prevented nationalization of the banks and it may yet prevent farmers' compulsory membership in agricultural marketing schemes. The EEC treaty provisions, which are less controversial, try only to ensure that government-controlled enterprises will abide by the rules.

There are practical reasons why protection should take constitutional form. As is recognized in all federal constitutions, provinces have more incentives to raise barriers than to prevent them. They do not have to answer to voters outside their borders. In Canada, provinces have an additional reason to be relatively uninterested in removing barriers: many of them rely more on exports to other countries of basic products than they do on shipments to other provinces of goods that are vulnerable to barriers. Consequently, they are little concerned about retaliation from other provinces, except in the field of personal mobility.

Quebec and Ontario are the two provinces that depend heavily on interprovincial trade in manufactures. The Parti-Québecois government of Quebec is more concerned about reinforcing provincial autonomy than about strengthening Canadian economic and political integration. Ontario has the only provincial government that is strongly interested in free interprovincial movement. Only new constitutional provisions therefore are likely to control provincial barriers effectively. The question of constitutional restraint on federal barriers is discussed later in relation to a free trade guarantee.

### 2. (a) Should any new constitutional provisions take the form of an increase in federal powers?

The federal government proposed during the 1980 constitutional discussions a clarification of its exclusive jurisdiction over trade and commerce, and a specific concurrent power, with federal paramountcy, over "competition" and "the establishment of product standards throughout Canada". (See annex 2). No province was inclined to support the clarification, but a few were willing to accept the proposals regarding competition and product standards.

It is hard to know whether the clarification would have extended federal powers: it depends on judicial interpretation. The question that will be considered here is whether there should be such an extension.

The federal authorities in the four other federations have more power over internal mobility than does the Canadian federal government. While this fact alone does not argue for increased federal powers, it does suggest that this alternative should be looked at closely.

An extension of federal power probably would take one or both of the two forms envisaged in the federal proposals: wider judicial interpretation of existing federal exclusive powers, and new constitutional provisions that would give Parliament concurrent power over specific matters. These matters could include not only competition and product standards but others such as local purchasing preferences and locational incentives for industry.

Judicial interpretation of the federal exclusive power over trade and commerce has been relatively narrow, partly because the courts have held that intraprovincial trade comes under provincial jurisdiction.

The distinction between interprovincial and intraprovincial trade may at one time have been appropriate for the geographically large federations but now it is a difficult one for the courts to apply.[11] Professor P.E. Nygh calls it an attempt to divide the indivisible, leading to legal fictions. The U.S. Supreme Court has long since given up the attempt to make such a distinction, or to exclude by definition certain processes such as production from the ambit of interstate trade. The court in *Wickard* v. *Filburn* (1942), said "the court's recognition of the relevance of the economic effects in the application of the commerce clause, . . . has made the mechanical application of legal formulas no longer feasible."[12] Today, whatever the court determines affects interstate trade, and in practice that can include pretty well everything that comes under the commerce clause. That determination does not require a definition of intrastate trade.

The dramatic extension of the reach of the commerce clause by the U.S. courts may make provincial governments in Canada apprehensive about a wider interpretation of the federal trade and commerce power. However, it is easier for the courts in the United States, and in Australia too, to allow a broad interpretation of the federal commerce power because they do not run up against a list of exclusive state powers such as one finds in section 92 of the British North Amercia Act. In the United States, the states' reserve powers now count for little. In 1937, the Supreme Court "effectively withdrew from the debate over the reach of federal power vis-a-vis the states," leaving protection of state autonomy to the political processes of Congress and the executive branch. In Australia, the sole limitation on federal powers is in court interpretation of the reach of those powers. The states' residual powers still count for a good deal, but the effect of court interpretation has been to diminish state powers and this process is likely to continue.

So far as competition policy is concerned, the federal authorities in the four other federations clearly have greater powers than the Canadian government, as shown in Part 2 of the paper. Some Canadian provinces have expressed concern that provincial regulation of the professions might be threatened if Parliament were given greater powers over competition. In the United States, Congress exempts from anti-trust legislation state-directed actions that regulate the professions. Although the Supreme Court has struck down a minimum fee schedule for lawyers, it was not a schedule legislated by the state in question. Australia's Trade Practices Act also exempts activities authorized by state legislation. Canada could adopt a similar arrangement if federal competition powers were increased.

The competition provisions in the European Coal and Steel Community and EEC treaties are fundamental to the common markets they established. They cover both private and public enterprises, as well as state aids that affect trade between member states. Not only is there a special section of the EEC treaty covering the Rules on Competition, but there are also a number of other articles that prevent discrimination among firms or channels of trade, such as Article 80 relating to transport.

Competition policy is unusual in the community scheme of things in that the Commission of the European Communities plays a direct role in administering the treaty provisions. Some lawyers complain that the Commission is at once prosecutor, judge, jury and executioner. Since many European firms produce for a community or international market, the Commission's competition jurisdiction is extensive and growing.

It may be that some concerns of Canadian provinces could be met by a larger federal competence in competition policy. For example, the premier of Nova Scotia complained about Central Canada dumping its products in the Maritimes. British Columbia and Quebec both have said that the danger of economic concentration was why they intervened to prevent outside takeovers of provincially-based companies.

The field of product standards is one which, with increased internal and international trade, and the increased complexity of the goods being traded, is best handled by national or even by international authorities. Both the EEC and OECD are active in the field. In at least two of the other four federations the federal authorities have greater powers over product standards than the Canadian government.

Finally, in the four federations there is greater federal jurisdiction in areas which have an important indirect effect on trade, such as labour matters.

A wider judicial interpretation of the Canadian government's exclusive jurisdiction over trade and commerce would, as already noted, come up against provincial exclusive powers over other matters. This is a legal constraint. On the other hand, any extension of federal jurisdiction that arises as the result of new concurrent jurisdiction would be subject to political constraints.

While governments have powers, there are obviously political limits on the extent to which they can use them. Parliament has a general power to disallow any provincial legislation, including legislation affecting free movement, but this power has not been used for many years and its use now would create such a political uproar that its existence is mainly theoretical. Federal authorities elsewhere also are subject to political constraints. The U.S. Congress and the Australian Parliament allow their respective states to give local purchasing preferences and to grant locational incentives for industry, even though it is probably within their power to legislate against them.

Past experience in Canada suggests that political constraints will inhibit the federal government from using concurrent powers agressively to reduce internal barriers. The provinces are likely to remain politically strong. They will be able to bring pressure on the federal government in particular so long as the federal electoral system results in governments that lack strong representation in one or more regions of Canada.

### 2. (b) Should new constitutional provisions take the form of mobility rights for individuals and an enlarged section 121 guarantee of free movement?

The first question concerns mobility rights for people. It is widely recognized that an important advantage of a federal system is the opportunity it gives for healthy competition among the constituent units, in such matters as the efficient use of tax revenues and the appeal of different public programs. However, such competition fails to be wholly useful if people cannot easily move from one province to another. Mobility rights help to ensure that they can.

Just as discriminatory measures promote division, mobility rights and free-trade guarantees are thought to promote political as well as economic integration, to consolidate a sense of common citizenship and to ensure equality of commercial opportunities. This belief was at the heart of the founding of the EEC. A U.S. judge, speaking in 1868 of Article IV, section 2 of the United States Constitution, which prohibits discrimination by a state against out-of-state citizens, observed that "it has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of this kind . . . the Republic would have consisted of little more than a league of states."[13] Chief Justice Vinson said in 1951 that "the primary purpose of this clause . . . was to help fuse into one nation a collection of independent sovereign states."[14]

Australia's section 117 prohibits any discrimination against "a subject of the Queen" (citizen was too republican a word in 1900) on the grounds of his being resident in another state. It has been said of section 117 that the provision was designed "to give a unity to Australia for the purposes of commercial and civil intercourse and common citizenship."[15]

Discrimination on the basis of residence in another state, writes Professor Clifford Pannam, is "inconsistent both with the relationship which should exist between the states of a federal system and with the common citizenship that is created by it."[16]

All of the other four federations and the EEC have mobility rights for people set out specifically in their constitutions. The general rule is that a state may not discriminate in a hostile way against a resident of another state.

At the September, 1980, First Ministers' Conference, most provinces were opposed to the inclusion of a charter of fundamental rights in the Constitution; several also were opposed to the inclusion of mobility rights, regardless of whether they formed part of a charter. The federal government nevertheless included such rights in the resolution which it subsequently laid before Parliament. At the November, 1981, First Ministers' Conference, the consensus was in favour of these rights, but they were made subject to an escape clause that seriously weakens them. A province with an unemployment rate higher than the national average may disregard the rights in order to favour particular classes of individuals within the province.

One purpose of the escape clause was to allow provincial legislation of the kind enacted by Newfoundland requiring certain oil and gas companies to give preference to hiring Newfoundland residents and to purchasing local goods and services, although it is not clear that the clause will in fact, permit a preference for such a large proportion of a province's residents. No other federation or even the EEC has such an escape clause. The U.S. Supreme Court in the case of *Hicklin* v. *Orbeck* (1978) struck down an almost identical preference given to state residents by Alaska. The court said that Article IV of the Constitution prohibits "discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states."

Much of the discussion about mobility at the September, 1980, conference focused on the question of strengthening the section 121 guarantee.

Exclusive federal jurisdiction over interprovincial commerce has much the same effect in preventing barriers imposed by provincial governments as does a guarantee, because the courts will rule invalid provincial legislation that trespasses on the field even in the absence of federal legislation. This happens in the United States. Nevertheless, Canadian provincial governments seemed more willing to contemplate a strengthened guarantee than an increase in the ambit of federal exclusive powers. The latter allow positive measures, whereas a guarantee is purely restrictive. Also, a guarantee is perhaps more predictable in its effect.

While the effect of a guarantee may be more predictable several provinces were concerned that it was not predictable enough. Some of them questioned whether the courts were competent to make decisions in economic matters and, if they were, whether they should have the last word. A later section of this report examines the suggestion that was made for court decisions to be reviewed and possibly set aside by a political body.

Since a guarantee must be applied by the courts, normally without political flexibility, the wording of the guarantee is all-important. In this, the experience of other countries is instructive, particularly that of Australia, Switzerland and the EEC. Part 2 of this report contains details on judicial interpretation of their guarantees, and of federal exclusive jurisdiction in the United States.

A guarantee is a suitable way of ensuring free movement where the federal authority is politically too weak to deal effectively with provincial barriers; where there is no federal authority at all, as in the EEC; and where society wants to preserve a free market bias in the economy, to deter government intervention whether federal or provincial, as is broadly the case in Switzerland.

Australia does not easily fit into any of these categories and yet it has a strong guarantee. What happened was that the guarantee was ambiguously worded and the courts gave it a very broad coverage. Governments in Australia are not entirely happy with it, but have to live with it because constitutional amendment is not easy. Conservatives do not mind if the guarantee remains strong because it deters nationalization of industry. Many years ago a Labor government sought to nationalize the banks, but the courts said the guarantee gives individuals a basic right to engage in interstate commerce and the federal move would infringe that right.

Experience in other federations and the EEC suggests that where a guarantee is carefully worded the courts make sensible decisions. It may be that in today's complex trading world guarantees have to be spelled out at some length, so as to give adequate direction to the courts about the intention behind them. The EEC guarantees go into great detail. It was specifically provided, for example, that socialization of industry is to be allowed. President Mitterand's plan to nationalize a number of banks and industrial firms will therefore not infringe the treaties, although it will be harder to ensure that the nationalized businesses abide by the rules of competition and free movement.

### 2. (c) Should new provisions combine an increase in federal powers with mobility provisions and a strengthening of the s.121 guarantee?

There are different combinations in the five federations. The five may be divided into three categories.

In the first category are the United States and Germany, which depend mainly on exclusive federal trade powers and on mobility rights. In the second category are Switzerland and Australia; in both federations there are concurrent federal trade powers supplemented by mobility rights and strong free trade guarantees.

In the third category is Canada, in which narrowly-interpreted exclusive federal trade powers are combined with a narrow guarantee and an absence of mobility rights. The scope for provincial barriers is wider than in any of the other federations.

To reduce this scope, and possibly as well the scope for federal barriers, the choice lies among wider exclusive federal trade powers, new federal concurrent powers over specific subjects that relate perhaps indirectly to trade, a stronger section 121 guarantee, and mobility rights.

The background factors in Canada that affect the choice are the limits on the scope for wider interpretation of exclusive powers, the political constraints on federal use of concurrent powers, the tendency for governments to intervene in the economy, and the wide area of provincial legislative jurisdiction and overall autonomy that are a source of indirect barriers.

Where prohibitions are all that is needed, a stronger guarantee and mobility rights will be appropriate: they can cover matters which would now fall outside of the ambit of the likely interpretation of federal exclusive trade powers. Where restrictions need to be supplemented by positive legislative action, or where political flexibility is indispensable, as in the field of competition policy, specific concurrent powers would be more appropriate. Finally, a wider interpretation of federal exclusive powers would help to cover unknown future barriers that cannot now be identified and provided for in a guarantee or in specific concurrent powers.

### 2. (d) Should one give to a federal-provincial political body the power to allow derogations from a strengthened s. 121 guarantee?

A proposal to this effect put forward by provincial governments was included in an appendix to a report submitted to first ministers by the Continuing Committee of Ministers on the Constitution.[17]

The proposal was that, even though a court might find that a law or practice of Parliament or a legislature conflicted with a free trade guarantee, a political body, possibly a new second chamber, could, within six months of the finding, rule that the offending law or practice was nevertheless "desirable public policy" and set aside the application of the judicial decision. Another idea was that the ruling could be made in advance of, rather than after, a court case.

The political body presumably should include representation from the federal government as well as the provinces; the proposed "council of the provinces" which some provinces had in mind as the new second chamber, would have been composed only of provincial government representatives acting on instructions, and so might not have qualified. The Government of Ontario, for one, believed that the federal government should be represented in any political mechanism that would allow derogations from Section 121.

At the end of the discussion of the mobility question at the September conference the federal government seemed prepared to accept, as part of an overall agreement on a constitutional package, the establishment of a federal-provincial mechanism, although the nature of the mechanism was not spelled out. In any event, the provinces by this time were no longer prepared to accept a strengthened section 121 guarantee: they preferred a constitutional amendment that would go no further than a simple statement of principle, combined with a commitment by governments to co-operate with one another.

The question is, was a federal-provincial mechanism a good idea? Should the federal government, which had not actually proposed it, have been willing to accept it?

Of the other federations, only Switzerland and Australia have a specific guarantee. Neither of them has a federal-state escape mechanism. In Switzerland, federal legislation may for specific purposes, which are fairly broad, depart from the guarantee where necessary.

In Australia, both federal and state legislation are subject to the section 92 guarantee. The question of a federal-state mechanism arose obliquely in the context of the recent deliberations of the constitutional convention, which included a discussion of section 92. The present Commonwealth government seems disposed to live with the section, but it has been troubled by the way the section makes agricultural marketing legislation difficult, notably for wheat. In 1978 the government alluded to the possibility, without proposing it, that the Constitution be amended to exempt the Commonwealth from the section 92 guarantee so that it could enact regulations of a non-discriminatory nature, apparently with regard to agricultural marketing, if there was unanimous agreement on the regulations beforehand among the Commonwealth and state governments.

However, it is more the rule in Australia to think of Parliament as the political mechanism for allowing derogations from the rules, rather than a federal-state body. Section 91 of the Constitution gives Parliament the authority to disallow "any aid to, or bounty on, the production or export of goods" granted by a state.

Similarly, in 1929, before the courts applied the section 92 guarantee to actions by the Commonwealth government, a royal commission recommended that the guarantee be relaxed but that the federal legislature be empowered to control state derogations from free interstate commerce. The commission recommended that "the Parliament of the Commonwealth may make laws prohibiting, modifying or annulling any law or regulation made by any state, or by any authority constituted by any state, having the effect of derogating from freedom of trade, commerce or intercourse among the states."

The commission's recommendations were not then implemented, but a constitutional expert, Professor Colin Howard, has suggested recently that they could with advantage be implemented now.

The EEC treaty has numerous guarantee-type clauses. In almost no case is any override possible, either by the appointed Commission or by the Council of Ministers. No override whatever is permitted of the basic guarantees relating to free movement. The Commission, which has both political expertise and a certain independence, does, however, have discretion with regard to other matters. For example, it may authorize discriminatory transport rates, and it has a large measure of discretion with regard to competitive trade practices and state aids.

The Council of Ministers may, acting unanimously, approve a derogation from the rules with regard to state aids. Generally, however, the council has no power to grant derogations from treaty rules. Usually, the council can act only on a proposal of the Commission, and this indicates a certain caution about putting too much power in these matters in the hands of a political body. There is no provision in the treaties for either the Commission or the council to set aside a decision of the Luxembourg court.

The principal argument for establishing in Canada a federal-provincial mechanism is that it would provide greater flexibility than court decisions.

The arguments against establishing a federal-provincial mechanism are both philosophical and practical.

1. The political body would almost certainly be composed of representatives of the executive branch of the federal and provincial governments: ministers or officials. Court decisions would, therefore, be set aside by an executive body without reference to any legislature. This seems to establish an unfortunate practice. If society does not like court decisions, it usually proceeds through legislative action to change the law rather than through executive action.

2. Too many things become the subject of continuous intergovernmental negotiation and conflict, that would otherwise be settled definitively by the courts. EEC experience shows how time-consuming it is to reach agreement among the members on harmo-

nizing various laws that affect trade. The difficulty is a major reason why both the EEC and GATT have trading rules covering most of the readily identifiable barriers, leaving negotiation to as restricted a field as possible. This should be Canada's approach too. A further point is that in Canada intergovernmental negotiation already bears too heavy a political load.

3. If the federal authority is politically weak in those negotiations, the results could be unfortunate for the economic and political union.
4. Both orders of government are susceptible to short-term political pressures. These could result in trade or other barriers in times of economic slump.
5. Traders and investors would probably prefer the courts because judicial decisions are more predictable than those of a political body.
6. If a court decision may be forestalled or set aside, the parties involved may be inclined to ignore the judicial process and attempt to make deals directly at the political level.
7. The rights of Canadians to equality of commercial opportunity in other provinces would be subject to a contingent political settlement. Such a settlement might be arrived at on the basis of considerations extraneous to interprovincial trade.

Given the relative lack already mentioned of provincial interest in removing barriers, the establishment of a federal-provincial body would probably be the least effective way to meet the basic objective of fewer barriers.

The provinces' lack of interest is partly explained by the nature of their interprovincial trade and the incentives they have to set up barriers. It is also explained by their lack of political accountability to Canadians who reside outside their borders. Only the federal government is accountable to all Canadians, and that is why questions of interprovincial and international trade are in all federations essentially matters for the federal level.

3. Should a section 121 guarantee operate with regard to the criterion of discrimination or some other criterion?

The present section 121 says simply that "All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces." This probably meant free of fiscal charges. Governments have since evolved more sophisticated methods of hindering trade.

The strengthened section 121 proposed at the 1980 conference (see annex 2 for the revised federal draft) would prohibit Canada or a province from discriminating by law or practice against people, goods, services and capital on the basis of province or territory of residence, origin or destination. Exceptions would be allowed, notably with regard to regional development measures. Executive as well as legislative discrimination apparently would be prohibited. The free admission rule under the existing s. 121 would be retained and extended to people, services and capital as well as goods. Also, imports that already had been admitted into Canada and had cleared customs would apparently be covered.

Part 2 of this report contains a good deal of information on the criteria used by the courts in other countries to determine what laws and practices should be prohibited.

In the United States there is no free trade guarantee as such, but a large area of federal exclusive jurisdiction. Congress may legislate as it will. The states, using their police power, may legislate with regard to commerce where there is no comparable federal legislation, where the effects on interstate commerce are only incidental, and where the burden placed on interstate commerce is not unreasonable in the circumstances. Direct regulation of interstate commerce by the states is not allowed. A state law that is discriminatory in intent will be struck down.

For example, state measures to control intrastate transport rates may be set aside if they "discriminate against *or* burden" interstate commerce. A state may levy a tax on corporations for the privilege of doing business in that state, but the tax must not be discriminatory or constitute an undue burden on interstate commerce. The judgments about such taxes do, however, present a "perennial" problem for the courts. Some practices, such as local purchasing preferences, have evidently survived the application of the relatively stringent criteria with regard to state legislation affecting interstate commerce.

In Australia, the section 92 guarantee accords to individuals and corporations a basic right to engage in interstate trade, free from almost any burden. A burden that applies impartially to both interstate and intrastate trade will, nevertheless, infringe section 92. The section actually operates in some circumstances to favour interstate over intrastate trade. Reasonable federal or state regulation appropriate to an ordered society is, however, allowed to burden interstate trade, as are the indirect effects on such trade of government regulation.

The 1929 "Report of the Australian Royal Commission on the Constitution" recommended that section 92 should prohibit only measures which discriminate against interstate trade, that is, measures "imposed by reason only of goods or persons passing interstate." However, this would have been supplemented by a new federal power to disallow or modify state measures that derogate from the freedom of interstate trade.

In the EEC, the treaty provisions prohibit fiscal charges on imports or exports among member states, or quantitative restrictions, or measures having equivalent effect. There are also general and specific prohibitions against discrimination in the treaty articles.

The term "measures having equivalent effect" has been given a broad definition by the Luxembourg court. It includes, in principle, all government purchasing preferences for local suppliers. The term embraces "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade." The operative word, therefore, is "hindering." In line with this interpretation the court has struck down even measures that have no protective effect on a member state's production, such as measures which favour particular trade channels or importers. The EEC treaty also says that the common agricultural policy shall exclude any discrimination among producers or among consumers. The close connection with competition policy is clear.

EEC member states have certain reserved powers, but measures hindering trade must not be out of proportion to their purpose. The U.S. courts sometimes apply a similar test: the least restrictive measures capable of achieving a legitimate objective must be used.

To summarize, the criteria used by other countries include discrimination, hindering or burdening interstate trade, and the test of the least restrictive remedy. Indirect as well as direct effects sometimes also are prohibited.

### 4. Should federal as well as provincial legislation be subject to mobility rights and a section 121 guarantee?

The proposals tabled at the 1980 conference would have had this effect, although there were escape clauses for both Parliament and the provinces. (See annex 2). However, there was no escape clause with regard to mobility rights in the Charter of Rights and Freedoms subsequently proposed by the federal government. (See annex 3).

The other federations all have mobility rights and all governments are bound to observe them, although the Commonwealth government in Australia has been bound by section 92, which covers interstate "intercourse" as well as commerce, only since 1936. The German Constitution allows federal law to restrict mobility rights for certain specified purposes, such as to combat crime.

In the United States there is no restriction of a general kind on federal power over interstate commerce. There are limitations imposed by basic constitutional rights, such as freedom of speech. However, Congress has been able to use its control over the mails to reinforce the effectiveness of federal legislation. One example was the Securities Exchange Act of 1934, which closed the channels of interstate commerce and the mails to dealers refusing to register under the act. There are some specific restrictions in the Constitution. It requires that "all duties, imports and excises shall be uniform throughout the United States." Direct taxes other than income taxes must be levied in proportion to population. Also, "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." Taxes are prohibited on "articles exported from any state," and this presumably prevents Congress from taxing exports.

In Switzerland, the freedom of trade and industry is guaranteed subject to federal legislation enacted under the authority of the Constitution. The Swiss federal authority, therefore, is bound to respect the principle but may depart from it for good cause, within the limits of its legislative powers. The Canadian government's proposal for a strengthened section 121 would operate in a similar manner.

The Australian Constitution drew much of its inspiration from the U.S. Constitution and repeats some of its specific restrictions. Commonwealth taxation may not discriminate between states or parts of states; bounties on the production or export of goods must be uniform throughout the Commonwealth; and the Commonwealth may not "by any law or regulation of trade, commerce, or revenue, give preference to one state or any part thereof over another state or any part thereof." This last restriction was serious, but has been avoided in its most troublesome aspects by the wide interpretation given to the Commonwealth's power to make grants to the states "on such terms and conditions as the Parliament thinks fit."

As the result of judicial interpretation the Commonwealth has, since 1936, been subject along with the states to the free trade guarantee of section 92. Consequently, it has been unable to create national monopolies in banking or air services, and its powers over agricultural marketing are limited. Generally, if Commonwealth legislation unreasonably infringes upon an individual's right to engage in interstate commerce it will be found unconstitutional under section 92. Opinion is divided in Australia as to whether the Commonwealth should be bound by section 92. Labor governments, whether federal or state, are generally against the restriction, and conservative governments favour it or are prepared to live with it.

In Germany, there is no restriction on federal authority with regard to interstate commerce, other than the limitations imposed by fundamental rights; these rights do not include a right to engage in interstate commerce.

Looking at other federations, the picture is, therefore, mixed. The federal authorities in the United States and Germany have virtually unlimited powers over interstate commerce. In Switzerland, they have broad powers subject to a commitment to observe the principle of free movement. Only in Australia is the federal authority materially circumscribed, and even there the present government seems to be able to live with the particular limitations that have been imposed by the courts.

The relative freedom of action in other federations of the federal compared with the provincial authorities with regard to interstate commerce reflects the essential difference between federal and provincial political responsibility. Most controversy about federally-imposed barriers can and should be settled through the ordinary processes of federal politics, whereas provincially-imposed barriers are not susceptible to the political pressure of many of those people most affected. There is, therefore, much more of a case for a guarantee to bind the provinces than Parliament.

On balance it looks as though the federal authority in Canada should have substantial freedom with regard to measures relating to interstate commerce, subject possibly to a commitment, as in Switzerland, to depart from the principle of free movement only where necessary. The small size of the Canadian market, and the already large role and influence of the government sector, could justify this limitation on complete federal freedom of action.

In the constitutional discussions in Canada in 1980, some provinces defended their discrimination against the residents and suppliers of other provinces on the grounds that if the federal government was able to discriminate, such as by spending more money in one province than another, and if the effect of federal policies was sometimes uneven across the country, the provincial governments should be able to discriminate too.

It is most unlikely that such arguments would be advanced by state governments in other federations. They illustrate the current provincial political challenge to federal authority in areas of joint federal and provincial, or even solely federal, responsibility. Provincial discrimination against out-of-province entities is universally recognized in all federations to be against the rules in principle even where it may be tolerated in practice.

Federal discrimination among provinces or states, on the other hand, is a feature of the federation in action, one of the reasons why a federal authority is given power. The unconditional equalization grants program in Canada, a comparatively although not wholly uncontroversial scheme, is an example. This does not mean that any kind of federal discrimination should be allowed. For example, mobility rights should for the most part bind all governments. But it does mean that federal discrimination of a kind normal in a federation, which is politically supported by the national legislature, cannot logically provide an argument for provincial discrimination against other Canadians.

### 5. What provincial derogations from mobility rights or a section 121 guarantee should be permissible?

On this subject the material in Part 2 on the United States and the EEC is particularly of interest.

On mobility rights, the U.S. courts will allow discrimination if it is not hostile and reflects a reasonable attempt to secure equality of treatment or to protect a legitimate state interest. Where the fundamental right to travel is concerned the courts apply the stringent test of whether the state is promoting a compelling state interest by burdening the right. If the state can prove a compelling interest it must then show that the interest cannot be promoted by any less restrictive measure.

States are allowed to prescribe a minimum period of residence for professionals, but "there must be a reasonable relationship between the nature of the discrimination involved and the legitimate interests of the state in regulating and policing the professions."

In Switzerland, the cantons are able to charge outside students higher fees, despite Article 60, which requires equal treatment of all Swiss citizens as a general principle. However, an agreement between the cantons now ensures equal treatment.

In all federations and the EEC discrimination against out-of-state workers is prohibited, no matter what the local unemployment level, except that in the United States a state may give preferment to local residents for government jobs or public works employment. Discrimination against outside citizens who buy land is also prohibited, although in the EEC the precise reach of the relevant treaty provision is not clear.

So far as interstate trade is concerned, the states' police power, which covers health, safety, morals and public order, is the usual area where derogations from free movement are permitted. In the United States, state legislation will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the local benefits, and the burden must be no more than is necessary. And Congress can always legislate. Protectionist measures are struck down. The states have special powers with regard to alcoholic drinks.

In the EEC, as in the United States, derogations are allowed for the police power. Discrimination is permitted, but it must not be arbitrary or a disguised restriction on trade; nor must measures burden trade more than is strictly necessary to achieve the desired end. If a product meets the legal requirements of the member state of manufacture it should be accepted by other member states unless there is an imperative reason. In principle, government purchasing preferences for local suppliers are prohibited, but council directives establish exemptions, such as when artistic considerations or urgency are involved.

Some U.S. judges have been uneasy about the courts' arbitral role in weighing the needs of the police power against those of interstate commerce. They recognize, however, that Congress can exercise its ultimate responsibility in this field.

In the EEC the courts seem less concerned. Article 95, which prohibits discriminatory internal taxation on imported goods, occasionally gives difficulty for judicial interpretation. The Luxembourg court nevertheless has held that the article has direct effect, that is, it should be enforced by national courts. "Although this provision involves the evaluation of economic factors," observed the court, "this does not exclude the right and duty of national courts to ensure that the rules of the Treaty are observed whenever they can ascertain...that the conditions necessary for the application of the article are fulfilled."[18]

6. What constitutional provisions or administrative measures are required to harmonize state measures not prohibited by mobility rights or a section 121 guarantee but which nevertheless impede the operation of an economic union?

The EEC, lacking a federal government and with a loose political framework, has judged it prudent to set out in detail in the treaties the obligations of member states. Also, in its attempt to achieve a closer political union through strengthened economic ties, it has gone about bringing into line in a systematic way the legislation of member states that it considers essential for the proper functioning of the common market; the laws that are harmonized are generally those that have a substantial effect on the costs of businesses. As a result, the community has tackled problems that have not been tackled in Canada and the four other federations.

Part 2 of this report contains detailed information on the treaty provisions and harmonization measures of the EEC. Here are a few examples of particular interest:

- Competition policy plays a key role.
- State monopolies, public undertakings, and state aids are subject to treaty provisions. Certain state aids must be notified in advance to the Commission, and individuals may take court action if a member state fails in this obligation.
- There is at the community level a loose industrial policy framework for state aids.
- The community is attempting to standardize corporate tax structures, as well as to confine corporate tax rates within an agreed band.
- There is a ban on member states' financial aid to farmers outside the framework of the common agricultural policy, with minor exceptions.
- There are measures to ensure portability of pensions and other social security benefits.
- Equal treatment of men and women by the social security system is to be implemented by 1984.
- There is an attempt to reach agreement on the harmonization of company and commercial law.
- There is reciprocal recognition of diplomas in the medical field.
- University students from another member state pay the same fees as local students.
- A common drivers' licence will be introduced by 1986.

The other federations are also a source of ideas for constitutional provisions and co-operative measures. In the United States and Switzerland standardization is difficult because of the large number of states. The Swiss cantons nevertheless co-operate closely in a number of fields. The common machinery used for the control of medications is a notable example. In Germany, most legislation is federal. However, joint arrangements for regional development aid are of interest. In Australia, there is a federal-state scheme to standardize companies and securities legislation.

### 7. Should there be special interprovincial trade provisions to protect provincial autonomy over natural resources?

This subject was discussed at the 1980 conference, and the prime minister's report on the differences between the positions of the federal and provincial governments was noted earlier in this paper. It was the Canadian government's intention, with regard to the resolution requesting patriation of the Constitution, to exclude any new provisions that would add to the powers of either order of government. However, in a move to secure additional support for the resolution, notably from the New Democratic Party and Western provinces, the government eventually included in the resolution a provision giving additional powers to the provinces over natural resources. (See annex 3).

The new provision would give the provinces:

- exclusive jurisdiction over exploration for non-renewable natural resources in the province, and over the development, conservation and management of such resources, as well as forestry resources and electrical energy
- concurrent jurisdiction with federal paramountcy over interprovincial trade in these products, but provincial laws could not discriminate with regard to prices or supplies of goods exported to another part of Canada
- the power to levy indirect taxes in respect of these products, provided that the taxes do not discriminate between products exported to another part of Canada and production retained in the province.

Among the effects of these new provisions would be the following.

- To the extent that the new provincial exclusive jurisdiction limits the reach of the federal power over interprovincial trade and commerce, the provinces would receive protection from the possibility of federal legislation. Provincial authority to take action resulting in reduced shipments to destinations outside the province would be clearer than it is now.

- To invalidate provincial legislation with regard to interprovincial trade, the federal government would have to introduce legislation in Parliament. At present, it could simply appeal to the courts.
- The indirect tax provisions would allow provinces to impose taxes at any level on products which are mainly exported from the province without fear that the tax might be struck down.

To what extent are such powers held by states in other federations?

In Germany and Switzerland, the natural resources in question are not as important to the individual states as Canadian natural resources are to the provinces. Coal and forests are of some importance in Germany. Trade legislation is exclusively federal; authority to levy certain indirect taxes such as excise taxes is shared, according to specific resources. In Switzerland, hydro-electric power is important, and so are forests. The rivers, lakes and mountains are the property of the cantons, and the use of hydro power is based on a cantonal licence. However, the exploitation of both hydro power and forests is placed under the "high supervision" of the confederation. Trade is subject to the free trade guarantee and to federal legislation. The right to levy indirect taxes is shared.

In the United States, federal ownership of land and natural resources is relatively greater than in Canada. Federally-owned land makes up most of the area west of a line drawn through Brandon, Manitoba. The federal government also controls water rights throughout the United States. The state proprietary ownership of natural resources is less common than in Canada, but the states do enjoy important revenues from resources such as oil and gas, mainly in the form of severance taxes but also some royalties. Interstate trade legislation is federal.

In Australia, the states have important interests in natural resources, as does the Commonwealth offshore. Interstate trade is a concurrent area, with federal paramountcy, subject to the section 92 guarantee. States may not levy excise taxes, but they obtain revenue from resources through royalties, rail freight charges, obligations imposed on mining companies to provide or finance infrastructure, and licence fees.

Thus, in the other federations there is no special trade jurisdiction for the states in the area of resources. The scope of the concurrent jurisdiction to be given Canadian provinces in the proposed resolution will exceed that held by the states in any of the other four federations except perhaps in Australia, but in that country the section 92 guarantee is more restrictive than Canada's section 121. In the federations where resources are relatively important, the states have power to levy indirect taxes in the United States but not in Australia.

The case for special treatment of resources in Canada, with regard to interprovincial trade and taxation powers, appears to be founded on the particular importance of resource revenues in the economy and budget of certain provinces,[19] and is therefore linked with the wish of the provinces for a large measure of autonomy in economic matters. Provinces already have greater autonomy than the states in other federations with major natural resources.

Consequently, in comparative terms at least, the provinces' request for special provisions and the federal government's acquiescence can be understood only in terms of *realpolitik*. The provinces have succeeded in endowing their jurisdiction over natural resources with a certain sanctity or mystique. This has helped their case.

### 8. Should a province be able to interfere with free movement in order to reduce regional disparities within the province?

The various draft constitutional texts tabled at the 1980 conference would have allowed a province to derogate from the proposed mobility rights and section 121 guarantee in respect of a law enacted in relation to the reduction of substantial economic disparities between regions wholly within a province, provided the law drew no distinction that was more disadvantageous to individuals, goods, and so on, from outside the province than it was to persons and goods from inside the province.

Not everyone was happy with this proposal. A Saskatchewan paper said that some provincial policies designed to develop parts of a province could have a serious discriminatory effect not only on the rest of the province but on the rest of Canada.[20]

There are no comparable provisions in the constitutions of other federations. In Switzerland, the freedom of trade and industry is not dependent on cantonal borders, but the cantons are tiny. In the United States, the right to travel has been held to cover intrastate as well as interstate movement. In the EEC, the mobility rights of nationals of member states may not be restricted within a member state: once admitted to the country as a whole, no limitation may be placed on movement inside it.[21]

The proposal to allow intraprovincial restrictions in Canada was designed to allow provincial governments a wider range of options with regard to regional development, and with regard to affirmative action programs intended to help underprivileged classes of people catch up to others in the province. It is likely that there are sufficient ways open to a provincial government without burdening the freedom of trade or, even worse, the mobility rights of people. The mobility rights contained in the resolution requesting patriation are not subject to any such unfortunate proviso.

## CONCLUSIONS

The overall conclusion is that in Canada the relationship between economic and political unity has been recognized but not sufficiently stressed in public discussion; that constitutional provisions and administrative arrangements relating to mobility will not ensure unity but can help promote it and prevent disintegration; that the present provisions and arrangements in Canada give less protection to mobility than in other federations, and even in some cases than in the EEC, and that existing and potential barriers constitute more of a problem in Canada than in other federations.

In Part 1 a number of issues have been identified, based largely on the federal-provincial intergovernmental discussions of 1980. The following are the conclusions of this report in relation to each of those issues.

1. Having regard to the intimate connection between economic and political unity, and the fact that Canadian manufactures are produced mainly for a small domestic market, a strong argument can be made that the existing and potential problem with regard to free movement in Canada is serious enough to warrant new constitutional provisions that would go beyond a non-binding commitment to intergovernmental co-operation.

2. (a) These new constitutional provisions could justifiably include an increase in federal powers. The federal authorities in the four other federations have greater powers regarding interstate trade and competition policy; they also have greater jurisdiction in areas that have an indirect effect on trade. Adequate federal powers in the field of competition policy are particularly important.

   (b) There are entrenched mobility rights for individuals in all the other federations and in the EEC. Effective mobility rights and a strengthened section 121 free-movement guarantee would promote national unity as well as assure Canadians of equality of commercial opportunity throughout Canada. The provinces' concerns about court interpretation of mobility rights and a guarantee are understandable, but courts elsewhere have applied reasonable solutions, and provinces' concerns could in part be met by a fuller text. While mobility rights for Canadians are included in the resolution requesting patriation, the escape clause for use by provinces with above-average unemployment is unknown in other federations and in the EEC and seriously weakens the rights in question.

(c) Increased federal powers and a strengthened s. 121 guarantee would usefully complement one another. Both are needed because the guarantee would not be a substitute for increased federal powers over matters such as competition policy; and because federal powers alone are likely to be inadequate to deal with some important barriers, in view of the legal limits on federal exclusive powers and the political constraints that will probably affect the use of any new federal concurrent powers.

(d) It would be unwise to give to a federal-provincial political body the authority to set aside or forestall court decisions which hold that the guarantee has been infringed. One reason is that too many matters which could be definitively settled by the courts would become the subject of continual political negotiation and conflict. A second is the relative lack of provincial interest in preventing barriers. If there is apprehension about the inflexibility of court interpretations, a better solution would be to give Parliament limited authority to allow exceptions from the application of the guarantee. Such discretionary authority is common in the Swiss Constitution, and appears in the German Constitution regarding free movement of individuals, a basic right.

3. It may be that a strengthened section 121 guarantee should operate not only with regard to the criterion of discrimination but also as to whether interstate trade is unreasonably hindered and whether necessary derogations are made in the manner least restrictive of trade. It should cover public monopolies and undertakings and should extend to local purchasing preferences.

4. Federal legislation should respect mobility rights and the guarantee, but should be able to depart from the guarantee for specified purposes or when a special procedure is invoked. The purposes and procedure could be laid down in the Constitution or in federal legislation which respects the principle.

5. Provincial legislation should, through court interpretation, be able to derogate from mobility rights and the guarantee where discrimination is not hostile, where it is reasonable in the circumstances, where a legitimate provincial interest is served, and where the infringement is kept to a minimum consistent with the objective.

6. There should be constitutional provisions and intergovernmental action to harmonize legislation and government measures not

prohibited by mobility rights or a section 121 guarantee but which nevertheless impede the operation of the economic union. This includes state aids, where the EEC arrangements are of interest. Corporation tax laws and rates ideally should be uniform across the country, or be able to diverge only slightly, possibly under federal framework legislation; a code of conduct regarding locational tax incentives for industry would be a useful second best solution, possibly with federal authority to disallow such incentives as in Switzerland. Company and securities law should be harmonized, perhaps along the lines of the new Australian scheme. There should be reciprocal recognition of such things as medical diplomas and drivers' licences, as in the EEC. An independent and permanent commission could be established to make proposals to the federal and provincial governments on these and other matters relating to economic mobility. It could also be given supervisory authority regarding competition policy, like the German Monopolies Commission.

7. The other federations covered by this study, including those where natural resources are important to the states, have no special trade jurisdiction for the states with regard to natural resources, or special limitations on federal authority. The view of most analysts in Canada seems to be that in the field of economic mobility federal powers are already too weak. The provinces' request for special provisions and the federal government's acquiescence can therefore be understood only in terms of *realpolitik*.

8. Provinces should not be allowed to derogate from constitutional free movement guarantees in order to reduce regional disparities within the province. Alternative methods are preferable.

The practical difficulties in the way of implementing these conclusions in the present political situation in Canada are touched upon in the summary.

# ANNEX 1

## THE PRESENT PROVISIONS IN THE BNA ACT

### Section 91

Parliament has exclusive authority to make laws with regard to:

2. The Regulation of Trade and Commerce.

### Section 92

Provincial legislatures have exclusive authority to make laws with regard to:

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

13. Property and Civil Rights in the Province.

16. Generally all Matters of a merely local or private Nature in the Province.

### Section 121

All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

# ANNEX 2

## PROPOSALS TABLED AT THE FIRST MINISTERS' CONFERENCE OF SEPTEMBER 1980 [22]

1. Excerpt from Conference Document 800-14/061. Legal text forming an appendix to a report of the Continuing Committee of Ministers on the Constitution to first ministers. This text differs mainly from the "revised federal draft of section 121" (see below) in that it includes sub-sections (4)(a) and (7), and in sub-section (5) it does not refer to sub-section (4).

### Draft 1 - Economic Union

121(1) Neither Canada nor a province shall by law or practice discriminate in a manner that unduly impedes the operation of the Canadian economic union on the basis of the province or territory of residence or former residence of a person, on the basis of the province or territory of origin or destination of goods, services or capital or on the basis of the province or territory into which or from which goods, services or capital are imported or exported.

(2) Nothing in subsection (1) renders invalid a law of Parliament or of a legislature enacted in the interests of public safety, order, health or morals.

(3) Subsection (1) does not render invalid a law of Parliament enacted:
  (a) in accordance with the principles of equalization and regional development recognized in section—;[23] or
  (b) in relation to a matter that is declared by Parliament in the enactment to be of an overriding national interest.

(4) Subsection (1) does not render invalid a law of a legislature:
  (a) providing for reasonable residency requirements as a qualification for the receipt of publicly provided goods or services
  (b) enacted in relation to the reduction of economic disparities between regions wholly within a province that does not discriminate to a greater degree against persons resident or formerly resident outside the province or against goods, services or capital from outside the province than it does against persons resident or goods, services or capital from a region within the province.

(5) Nothing in subsection (2) or (3) renders valid a law of Parliament or a legislature that impedes the admission free into any province of goods, services or capital originating in or imported into any other province or territory.

(6) Nothing in this section confers any legislative authority on Parliament or a legislature.

(7) A law or practice of Parliament or a legislature that is found inconsistent with subsection (1) by final judgment of a court of competent jurisdiction shall stand and be deemed to be valid and operative, unless repealed or rescinded, for six months after the date of the judgment during which time the (New Second Chamber) shall consider the law and if the (New Second Chamber) ratifies the law or practice as being desirable public policy notwithstanding that it is inconsistent with subsection (1), the law shall continue to stand thereafter.

## 2. Appendices to Conference Document 800-14/029: the Government of Saskatchewan's analysis of federal proposals.

### Appendix I—Revised federal draft on mobility rights

16. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Everyone in Canada has the right
  (a) to move to and take up residence in any province; and
  (b) to acquire and hold property in, and pursue the gaining of a livelihood in, any province.

(3) The rights, specified in subsection (2) are subject to:
  (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and
  (b) any other laws referred to in subsections (4) or (5) of Section 121 of the *British North America Act*.

### Appendix II—Revised federal draft of section 121

121(1) Canada is constituted an economic union within which all persons may move without discrimination based on province or territory of residence or former residence and within which all goods, services and capital may move without discrimination based on province or territory of origin or entry into Canada or of destination or export from Canada.

(2) Neither Canada nor a province shall by law or practice discriminate in a manner that contravenes the principle expressed in subsection (1).

(3) Subsection (2) does not render invalid a law of Parliament or a legislature enacted in the interests of public safety, order, health or morals.

(4) Subsection (2) does not render invalid a law of Parliament enacted
  (a) in accordance with the principles of equalization and regional development recognized in section—;[24] or
  (b) in relation to a matter that is declared by Parliament in the enactment to be of an overriding national interest.

(5) Subsection (2) does not render invalid a law of a legislature enacted in relation to the reduction of substantial economic disparities between regions wholly within a province that does not discriminate to a greater degree against persons resident or formerly resident outside the province or against goods, services or capital from outside the province than it does against persons resident or goods, services or capital from a region within the province.

(6) Nothing in subsection (3), (4), or (5) renders valid a law of Parliament or a legislature that impedes the admission free into any province of goods, services or capital originating in or imported into any other province or territory.

(7) Nothing in this section confers any legislative authority on Parliament or a legislature.

## Appendix III—Revised federal draft of part of section 91

1. Add to Section 91 the following heads of jurisdiction immediately following head 91.2:

   2.1 Competition.

   2.2 The establishment of product standards throughout Canada.

2. Add to Section 91 the following new subsections:

   (2) For greater certainty "regulation of trade and commerce" in subsection (1) includes the regulation of trade and commerce in goods, services and capital.

   (3) The authority conferred on Parliament by heads 91 (2.1) and 91 (2.2) does not render invalid a law enacted by a legislature that is not in conflict with a law of Parliament enacted under either of those heads.

# ANNEX 3

## EXCERPTS FROM THE RESOLUTION RESPECTING THE CONSTITUTION OF CANADA ADOPTED BY THE HOUSE OF COMMONS ON DECEMBER 2, 1981

## CONSTITUTION ACT, 1981

PART I

SCHEDULE B

### CANADIAN CHARTER OF RIGHTS AND FREEDOMS

*Mobility Rights*

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
   (a) to move to and take up residence in any province; and
   (b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to
   (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
   (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

NOTE: Section 30 of the Charter states that a reference in the Charter to a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories.

## PART VI, AMENDMENT TO THE CONSTITUTION ACT, 1867

**50.** The *Constitution Act, 1867* (formerly named the *British North America Act, 1867*) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

### "Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

**92A.** (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section."

**51.** The said Act is further amended by adding thereto the following Schedule:

## "THE SIXTH SCHEDULE

### *Primary Production from Non-Renewable Natural Resources and Forestry Resources*

**1.** For the purposes of Section 92A of this Act,

(a) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood."

## ANNEX 4

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## NOTES TO TEXT

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1. A.E. Safarian, *Canadian federalism and economic integration* (Ottawa: Information Canada, 1974), p. 96.

2. Judith Maxwell and Caroline Pestieau, *Economic Realities of Contemporary Confederation* (Montreal: C.D. Howe Research Institute, 1980), p. 27.

3. The Hon. Jean Chrétien, *Securing the Canadian Economic Union in the Constitution* (Ottawa: Supply and Services Canada, 1980), p. (vi).

4. "Notes for the use of the Hon. William G. Davis," Conference Document 800-14/079, and "Legal texts forming appendices to CCMC reports to First Ministers," Conference Document 800-14/061.

5. The proposed new Upper House, the Council of the Provinces, outlined in Conference Document 800-14/060, would be composed only of provincial representatives, and would apparently not meet this requirement.

6. "Powers over the economy: the Saskatchewan position," Conference Document 800-14/028; and "Powers over the economy: an analysis of the federal proposals," Conference Document 800-14/029.

7. "Legal texts forming appendices to CCMC reports to First Ministers," Conference Document 800-14/061.

8. "Notes for a statement" by Mr. Lyon and Mr. Craik, Conference Document 800-14/082.

9. "Notes for a statement by the Prime Minister," Conference Document 800-14/038. See also "Resources: the Saskatchewan position," Conference Document 800-14/027; and the "Best efforts draft" of 1979, in Conference Document 800-14/060.

10. This point is argued at greater length by Professor Alan Cairns in "The Constitutional, Legal and Historical Background," draft of an introductory chapter for the forthcoming American Enterprise Institute's volume, "Canada at the polls." He says, for example, that "in a federal state the displacement of the market generates intergovernmental conflict."

11. See especially P. E. Nygh, "An analysis of judicial approaches to the interpretation of the commerce clause in Australia and the United States," *Sydney Law Review*, 1965-67, pp. 353-397.

12. Quoted in Edward S. Corwin, *The Constitution* (Princeton: Princeton University Press, 1978), p. 66.

13. Clifford L. Pannam, "Discrimination on the basis of state residence in Australia and the United States," *Melbourne University Law Review*, 1967-68, vol. 6, pp. 105-149.

14. Ibid.

15. Ibid.

16. Ibid.

17. See annex 2, Draft 1, Economic Union, section 121(7).

18. Derrick Wyatt and Alan Dashwood, *The Substantive Law of the EEC* (London: Sweet and Maxwell, 1980), p. 29.

19. See "Resources: the Saskatchewan position." paper tabled at the September, 1980, Federal-Provincial First Ministers' Conference, Conference Document 800-14/027.

20. Conference Document 800-14/029, September, 1980, p. 9.

21. Wyatt and Dashwood, *The Substantive Law of the EEC*, p. 146. The Court decision in question concerned place of residence, but it seems to apply to free movement generally.

22. The legal texts regarding "resource ownership and interprovincial trade" are not reproduced here. They may be found in Conference Document 800-14/060.

23. In the draft proposal, this reference was left without a section number pending agreement on a new constitutional provision respecting equalization and regional development.

24. In the revised draft proposal, this reference was left without a section number pending agreement on a new constitutional provision respecting equalization and regional development.

# PART 2

## DETAILED DESCRIPTION OF MOBILITY PROVISIONS IN OTHER FEDERATIONS AND THE EEC

# INTRODUCTION

This part of the report is composed of separate studies on each of four other federations and the EEC. The sequence in which the studies are presented follows the chronological order of the dates of the present constitutions: The United States, 1787 (in force 1789); Switzerland, 1848; Australia, 1900 (in force 1901); Germany, 1949; and the EEC, 1957.

The studies, except for the one on the United States, follow the same format with only minor variations. There is, in each case, an outline of the federal system or, in the case of the EEC, the community, because it is only within the context of the overall constitutional and political framework that the mobility provisions and arrangements can be properly understood. The outline is followed by a description of the constitutional provisions and administrative arrangements relating to free movement. By "administrative arrangements" is meant the actual implementation by legislation and other means of the constitutional provisions. In the case of the United States, the study excludes a description of these arrangements.

Many things affect mobility, even unemployment insurance and fiscal equalization schemes for provincial revenues and expenditures. These studies cover, in addition to the main constitutional provisions, only those areas of government activity that are everywhere considered particularly relevant, such as competition policy, state aids, company law and social security. The choice, however, was necessarily arbitrary, in view of time constraints; other areas such as communications legislation, patents and trade marks are also relevant.

It should be noted that the studies are written from a Canadian point of view, which focuses on matters that are currently of interest in Canada's review of its constitutional arrangements. They are all dated early in 1981. A few changes were made during the summer and fall to take account of court decisions or other developments, but the changes do not represent a systematic up-dating of the studies.

Each of these studies has been reviewed for major errors of fact or emphasis by experts from the countries concerned. Any errors that remain are, of course, the responsibility of the author.

# UNITED STATES OF AMERICA

## Constitutional provisions relating to the free movement of goods, services, people and capital

## UNITED STATES OF AMERICA

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## ACKNOWLEDGEMENTS

I should like to thank Wayne Anderson, executive director of the Advisory Commission on Intergovernmental Relations, Washington, D.C., for commenting on the draft of my outline of the U.S. federal system. I also should like to thank Thomas J. Madden, formerly with the U.S. Department of Justice, for commenting on the whole draft and for his advice on some aspects of U.S. constitutional law.

John A. Hayes
February, 1981

## OUTLINE OF THE FEDERAL SYSTEM

There is concern in the United States that events in recent years, such as the increase in federal conditional grants to the states, have produced a lack of balance and a loss of operating efficiency in the federal system. This concern is not widespread, but is felt mostly in government and academic circles. The state governors in August, 1980, unanimously agreed to ask the President and Congress to establish in 1981 a commission on federalism to propose legislative and constitutional changes. President Ronald Reagan wants to return autonomy to the states, partly by reducing federal grants, but also by transferring regulatory functions.

State sovereignty gets little protection from the courts. The Supreme Court in 1976 struck down a federal law because it impinged on state sovereignty; it was only the second time it had done so in 40 years. The other time was when Congress sought to reduce the voting age to 18 years in state and local elections; a subsequent constitutional amendment made the reduction possible. But it is not clear whether the 1976 *National League of Cities* decision, described in the attached notes, marked an important turning point in the court's interpretation of federal powers.

Professor Lewis Kaden of Columbia University Law School notes that "from 1936 to 1976 Congress determined the allocation of governmental power in the federal system virtually without judicial interference."[1] The protection of state interests was left to the political branches: to Congress, where the states were well represented, notably in the Senate, and to the executive. However, since about 1960 there have been a number of developments that make senators and members of the House of Representatives less subject to the influence of elected state officials or state party organizations. Congressmen today have less interest in protecting state autonomy than in ensuring that the areas they represent get a goodly share of federal grants. Today, the states "confront a system of federalism more co-opting than co-operative." "Revenue is raised and standards of service are set nationally, but administration, eligibility review and enforcement are often left to local officials."[2]

The United States was the prototype for other federal systems. It is federal not only in structure but in a social sense. There is great diversity across a vast country. And yet, curiously, it has been gradually taking on one of the salient features of the German system in which uniformity rather than diversity is the rule: the states become administrative agents of the federal government.

Before explaining how this came about, it is necessary to set out some of the main differences between the U.S. and the Canadian federal systems.

- The U.S. system of government is based on the separation of executive, legislative and judicial powers.

- There are 50 states, compared with Canada's 10 provinces.

- As the result largely of the separation of powers and the large number of states, "executive federalism," that is, intergovernmental negotiation, is not the dominant feature of the federal system as it is in Canada. Regional differences about national policy are accommodated largely through Congress, which includes a directly-elected Senate composed of two representatives from each state. Federal spending programs usually have to include something for every state, or they won't get congressional approval. The efforts of the administration to provide selective aid have frequently been frustrated by Congress. One result is that there is "very little income redistribution as a result of federal spending."[3]

- Also, there is probably less redistribution than in Canada on the revenue side, as the result of the tax system. Social security in the United States is financed by direct levies, whereas in Canada general revenues finance a major share. It is said that over half of U.S. workers pay more in social security contributions than they do in income taxes. Receipts from these contributions were expected to exceed receipts from the personal income tax in 1978; they made up about 30 per cent of all federal revenues in 1979.

- There are certain basic rights guaranteed in the Constitution. This, and the important constitutional position of the Supreme Court, have resulted in a strong role for the courts in the political system.

- Racial and linguistic minorities in the United States are widely dispersed among the states. In Canada, the French-speaking minority is located mainly in one province where it is a majority. This difference helps to explain the different pattern of development of the two federal systems.

- One consequence of this difference has been a continual concern in the United States with the voting rights of minorities. There has been a series of constitutional amendments on this subject. Today, the approval of the Department of Justice must be sought for any changes to local government electoral arrangements, so far as parts of 35 states are concerned; the department seeks to protect the voting rights of minorities.

- It is at least partly because of congressional distrust of how state and local administrations might deal with their minorities, and because of the states' traditional rural bias, that all federal grants are conditional, and that the grants go directly to over 65,000 local governments in the United States. There is no program of federal unconditional equalization payments for state governments.

- The states have their own entrenched constitutions, which impose various constraints on legislatures and executives. In general, the states may not run a budget deficit, and in some states any new tax or increase in tax rates must be approved in a popular referendum. In 1976 the New Jersey Supreme Court declared a state school finance statute unconstitutional, and required the raising of an income tax to yield $400 million in new funds for education. The state legislature acted only after the court issued an injunction closing the entire school system.

- Amendments to the U.S. Constitution are, in practice, initiated by Congress and ratified when at least three-quarters of the state legislatures approve.

## THE EVOLUTION OF FEDERAL POWERS

The legislative powers of Congress are recited in Article 1, section 8 of the Constitution. The last paragraph contains the famous "necessary and proper clause":

> 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

In the important 1819 decision in *McCulloch* v. *Maryland*, the Supreme Court gave a wide interpretation of this clause. It was held that the 10th Amendment, which reserves to the states or the people powers not granted to Congress, did not prevent the federal government from taking action which interfered with the reserved powers of the states if the action was proper, and within the expressed or implied powers of Congress.[4] However, in subsequent years the court backed away from this. In 1871 it was held that the states, in the exercise of their reserved powers, were independent of regulation by Congress and that the federal government could not tax the salaries of state employees.[5] This doctrine was eventually reversed in the constitutional revolution which culminated in the case of *United States* v. *Darby* in 1941. The court in that judgment reaffirmed that the 10th Amendment did not "deprive the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."[6] The exercise of federal powers in this manner, including the commerce power and the power to provide for the general welfare, therefore overrides the powers reserved to the states.

In 1937 the Supreme Court "effectively withdrew from the debate over the reach of federal power vis-à-vis the states, dismissing with dispatch all subsequent challenges to the enormous expansion of federal legislative efforts to affect the public welfare over the next four decades."[7] Protection of state autonomy was left to Congress. Kaden quotes Wechsler: "The Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the States."

The implication of this for the states was to relegate them to a role as junior partner:

> In our federal system, the States' discretion over public policies is always subject to the constricting influence of the federal government's exercise of its delegated powers. As the national need has been defined and pursued over an ever-broadening range of subjects, the States have relinquished part of their historic responsibilities; thus, health care, welfare, transportation, energy, and environmental protection have all recently become the objects of national attention. Under the Constitution, the states must—and do—adapt their activities to these changes in federal priorities.[8]

Kaden, who is concerned about the decline of state autonomy, goes on to argue that "within the limits imposed by federal initiative" the states should be left free to determine how best to make use of their remaining area of sovereignty. Federal conditional grants and other federal actions have in fact impinged on state autonomy. These grants help to explain the sharp rise in the federal share of domestic expenditures.

## THE GROWTH OF PUBLIC SECTOR EXPENDITURES

Federal domestic expenditures increased from seven per cent of the Gross National Product (GNP) in 1959 to about 15 per cent in

1979. State and local expenditures in the same period rose from nine per cent of GNP to about 11 per cent. These figures are expenditures "from own funds," which evidently means before intergovernmental transfers.[9]

## THE MULTIPLICITY OF FEDERAL CONDITIONAL GRANTS

The Advisory Commission on Intergovernmental Relations (ACIR) has for a number of years been documenting the adverse effects of the rapid growth in the number of federal grant programs, and the effect of these programs on state and local administrative structures and the federal system generally. In 1976 Congress asked the ACIR to do a comprehensive report on these matters and the first volume of the report was published in August 1980. The State Governors Conference met about the same time, and the governors unanimously voted to ask the President and Congress to set up in 1981 a commission on federalism to propose legislative and constitutional changes. Some typical comments of governors were as follows:

> "The states are just administrative agents for the federal government."
>
> "The federal system is in complete disarray."
>
> "The federal umbilical cord is strangling us."
>
> "The federal government is dictating the uses not only of its funds but of ours too."

Federal grants, all conditional, increased from $7 billion in fiscal year 1960 to $83 billion in fiscal year 1980.[10] They increased very quickly during President Lyndon Johnson's administration as the result of his "Great Society" programs. These programs were intended to deal with typically urban problems, and many grants go directly to local governments, by-passing the states because of their rural or racial bias.[11] In 1979, there were 498 grant programs, and it was estimated that in fiscal year 1980 the conditional transfers would equal 23.6 per cent of state and local expenditures. Federal aid would be equal to 49.7 per cent of the "own sources" revenue of the 47 largest cities taken as a group.[12]

The basic constitutional authority for most grant programs is Article I, section 8, paragraph 1 (the spending or general welfare power), and the "necessary and proper" clause, mentioned earlier. The general welfare power reads as follows:

> . . . To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; . . . .

The court has held that the determination of what furthers the general welfare is uniquely a congressional function.[13] It has also consistently held that Congress may attach virtually any conditions to its grants, on the grounds that the states are not obliged to accept the grants and the conditions. Madden points out that a grant must not cross the line from inducement to coercion, but he knows of no instance where the court has found a grant to be unconstitutional.[14] So long as a state or local government remains nominally free to reject a grant, the court seems to take no account of the financial or political penalties involved in that rejection. Madden says that the Health Planning Act "virtually mandates" the passage of legislation by recipient governments, because a state's health care could be crippled by the withdrawal of federal grants.[15]

The strings attached to federal grants are often "extensive, expensive and intrusive." In recent years "the federal government has increasingly used assistance programs as vehicles for achieving national social policy goals, such as affirmative action, environmental quality, historic site preservation, and citizen participation. Some 59 of these cross-cutting requirements apply to most or all federal aid programs, regardless of purpose."[16]

Some conditions oblige the states and local authorities to change their administrative structures. The All Handicapped Children Act of 1975 contains detailed provisions controlling the relationship between the state agency concerned and local education officials.[17] As the result of the federalization of state and local structures, the location of responsibility for political decisions has become progressively blurred in recent years. This is said to compound the difficulties of representative government, difficulties to which California's Proposition 13 testified.

While President Reagan has spoken of returning autonomy to the states, it is an indication of the obstacles in the way of this that the chairman of his task force on urban policy suggested that federal grants should be withheld from all cities that persist in controlling rents.[18]

## FROSTBELT, SUNBELT, ENERGY, AND WESTERN ALIENATION

The shift of industry and population to the sunny South and West in recent years is due in part to lower taxes and different labour laws.

The federal Taft-Hartley Law allows states to pass right-to-work laws prohibiting union closed shops, and southern states have taken advantage of this provision.

Most oil and gas deposits are found in the sunbelt states and in Alaska. The states that have these deposits will benefit financially from the recent decontrol of prices, begun under President Jimmy Carter and to be accelerated under President Reagan. The six states that collect 80 per cent of all severance tax revenues (taxes on the extraction of natural resources) will benefit most. However, the federal government will, in the short run, receive about twice as much in windfall taxes as the states receive in severance taxes and royalties.

The states of the frostbelt are worried that the increased wealth of sunbelt states may be used to conduct what amounts to economic warfare on the rest of the country by building up their economic base at the expense of the frostbelt. There was an attempt in the Senate to subject the increased state royalties to the federal windfall tax, but it was defeated.

As the result of the continuing shift of population, it is estimated that by 1990 the South and West will have a majority of the seats in Congress. Along with the increased population and wealth goes a flexing of political muscle. "The Old West has become the Angry West, a region racked by an increasingly bitter sense of isolation and political alienation".[19] The only states west of Missouri won by Carter in 1976 were Texas and Hawaii. Now a Western candidate, Reagan, has won. Westerners are hoping to relax federal controls on the use of federally-owned land that makes up most of the area west of the 100th meridian, which passes through Brandon, Manitoba. Federal control also extends to water rights, on which depend the growth and power of the West.

"What we are seeing," says Professor Lipset of Stanford University, "is a revival of regionalism, a return to the old pattern of American politics."

# CONSTITUTIONAL PROVISIONS RELATING TO INTERNAL FREE MOVEMENT

## SUMMARY

The United States in terms of wealth is the largest homogeneous market in the world. With 50 states, interstate trade is inevitably important, and is little inhibited by the fact that many states are large in terms of geography or population. There are several constitutional provisions that have helped to bring this about, but the dominant one is the commerce clause, "the principal legal foundation for the efforts to build and sustain a national economy."

The clause gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It was intended to be primarily a curb on state actions that might interfere with the creation and development of a common market, and for most of the time since the Constitution was adopted this has been its main role: the role of a guarantee of free movement, enforced by the Supreme Court against state measures that would unreasonably burden interstate trade. Except for the "due process" clause of the 14th Amendment, the commerce clause is the principal basis for limiting state power.

For example, in 1935, during the depression, the court held in the case of *Baldwin* v. *Seelig* that a state has no right to promote its own economic welfare at the expense of the rest of the country, by prohibiting the entrance within its borders or the exit from them of "legitimate articles of commerce," the Constitution having been "framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[20]

Today, the commerce clause also is "the direct source of the most important peace-time powers of the National Government." This is partly because in 1787 the future responsibilities of the national government could not be foreseen, so that many powers specifically given to national governments in more modern federal constitutions are not mentioned in the U.S. Constitution; and it is partly because of the wide interpretation given to the commerce power by the courts.

Until the 1930s the commerce clause as a source of federal regulatory powers was limited. Transport and anti-trust legislation figured large among those that were being exercised. But with the constitutional revolution of the 1930s, involving the eventual acceptance by the Supreme Court of the New Deal and related legislation based on the commerce clause and other powers, the ambit of major federal regulatory legislation was extended into such fields as labour, communications, securities, agriculture, and social security. Since World War II others, such as environmental protection, price and wage controls, and oil pricing policy, have been added. Federal control extends well into intrastate trade, covering production and other indirect effects on interstate trade. An activity need have only a remote effect on interstate trade to be subject to federal regulation.

In addition, the *threat* of using federal regulation based on the commerce clause has been used to induce the states to adopt regulations that implement federal policy. A recent example is the Natural Gas Policy Act of 1978, under which administrative agencies in states producing natural gas must implement federal pricing policies for intrastate sales. The act has been challenged in the courts by several states.

Federal regulation under the commerce power has extended to state and local government activity as well as to private sector activity. Between 1937 and 1976, no federal commerce regulation was invalidated on state sovereignty grounds. In 1976 the Supreme Court in the *National League of Cities* case held that the extension of the minimum wage and maximum hours provisions of the Fair Labor Standards Act to state and local government employees violated the 10th Amendment. The 10th Amendment reserves to the states or the people powers not granted to Congress. The court considered that the determination of employment conditions for state employees was an "undoubted attribute of state sovereignty." The decision did not reverse the court's earlier one which, partly on the grounds of a national emergency, upheld the power of Congress to include state employees in a national wage freeze. Also, at least one subsequent decision illustrates that the court continues to support the long reach of the commerce clause into intrastate matters. In January 1980 the court held that the New Orleans Real Estate Board's agreement to charge a uniform commission on residential sales had a "not insubstantial" effect on interstate commerce. The court also continues to allow Congress to twist the arms of state and local governments by way of conditional grants.

Today, because of the commerce clause, Congress may legislate with regard to both interstate and intrastate matters subject only to political constraints and to the court's intervention based on the kind of grounds that arose in the *National League of Cities* case. Unlike in the area of fundamental rights, in the area of commerce "the Court's function is subordinate to that of Congress . . . Congress may determine with respect to any particular subject of commerce whether to pre-empt the regulatory field or to consent to diverse State actions."[21] The states may legislate with regard to commerce where there is no comparable federal legislation, where the effects on interstate commerce are only incidental, and where the burden placed on interstate commerce is not unreasonable in the circumstances. A state law which is discriminatory in intent will be struck down.

The states may act more freely in matters affecting interstate commerce in some areas, although there are limits. These areas include trade in intoxicating liquors, where the states have specific powers under the 21st Amendment, and areas where Congress has by legislation reserved concurrent fields to the states, such as certain aspects of banking, insurance and labour legislation.

With regard to the free movement of people there are other constitutional provisions which are relevant as well as the commerce clause. In this field, discrimination against people from outside a state is allowed if it is not hostile or unreasonable.

The companion studies to this one—on Switzerland, Australia, Germany and the EEC—attempt to assess the practical results of constitutional provisions relating to free movement. This study focuses mainly on a description of U.S. constitutional provisions and only occasionally describes the resulting administrative arrangements or government programs. Some general observations can nevertheless be made.

In the area of goods and investment, there are impediments to trade that arise as the result of the exercise by the states of their "police power," a reserved power existing by virtue of the 10th Amendment, such as the banning by some of urea formaldehyde as an insulating material in buildings; of state and local preferences for local suppliers; and of state and local subsidies and other incentives to attract industry.

Locational incentives are offered by most states and therefore tend to cancel one another out, but some major package deals, such as those offered to automobile manufacturers, have been important in attracting major investments. Right-to-work labour laws in some states, permitted by federal legislation, have also been important in attracting industry, as well as lower tax rates.

A state may not unfairly discriminate by taxation or other means against out-of-state citizens who may wish to acquire and hold real and personal property in the state.

In the area of services, the federal reservation of concurrent power to the states in fields such as insurance and banking means that the national market is fragmented.

There are barriers to the movement of people with professional qualifications. The states are able to discriminate against non-resident workers regarding government jobs and public works projects. However, the Supreme Court has said it is doubtful that a state could alleviate its unemployment by requiring private employers to discriminate against non-residents. Out-of-state citizens are assured access to medical services, welfare benefits and the right to vote without being obliged to fulfill "durational" residency requirements.

There is an income tax jungle at the state and local level which probably affects the movement of investment and people.

Many of these impediments could be removed or lessened by Congress through its exercise of the commerce clause, if there were sufficient political support. This probably includes purchasing preferences and industrial location incentives given by state or local governments.

## THE U.S. CONSTITUTION—FORMAT

The Constitution was drafted in 1787 to establish the federal system of government which began to function in 1789. It was composed of a short preamble and seven articles. In 1791, 10 amendments were adopted, called the Bill of Rights. These included the Fifth Amendment, preventing self-incrimination, and assuring the right to life, liberty and property in conformity with due process of law; and the 10th Amendment, reserving to the states or to the people those powers not delegated to the federal government.

An additional 16 amendments have been adopted since 1791, including the 13th, abolishing slavery; the 14th, covering the rights of U.S. citizens; the 16th, enabling Congress to levy income taxes: the 18th establishing prohibition of the sale of alcoholic drinks, and the 21st repealing it; and various amendments concerning the right to vote, including the most recent, the 26th, adopted in 1971, which gave the right to vote in state as well as federal elections to all those aged 18 or over.

Some of the original seven articles of the Constitution, and some of the amendments, are divided into numbered sections. Some articles and amendments, and some sections, are divided into numbered paragraphs. References are also frequently made to clauses, such as the "due process" clause of the Fifth and 14th Amendments.

## THE INTERSTATE COMMERCE CLAUSE

The principal source for these notes on the commerce clause is the work by Corwin listed on page 75.

The commerce clause is not only the foremost provision affecting free movement of goods, services and capital from state to state, but is also "the direct source of the most important peace-time powers of the National Government" and, except for the due process and equal protection clauses of the 14th Amendment, is the most important basis for judicial review limiting state power.[22] It is contained in paragraph 3 of section 8 of Article 1, and reads as follows:

> The Congress shall have Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

### Origin and Evolution of the Commerce Clause

The commerce clause was originally intended to be mainly "a negative and preventive provision against injustice among the states,"[23] and, for 100 years or so, judicial interpretation of the clause had mainly to do with limiting the exercise of state power in this field. It was only later that the courts were concerned with the federal exercise of regulatory power, notably with the Sherman Anti-Trust Act of 1890, and eventually with the New Deal legislation of the 1930s.

In an 1851 case it was held that, for interstate commerce, Congress's power was exclusive for those subjects that "imperatively demand a single uniform rule" operating throughout the country. As a result, state legislation on such subjects would be struck down even in the absence of federal legislation. However, for subjects that require diversity to meet local conditions, the states could legislate concurrently in interstate matters provided they did not conflict with valid federal law. These general 1851 propositions are still good law.[24]

However, two things happened to restrict the size of the interstate field in which the states could concurrently legislate. One was the development of rules of greater precision that limited the scope for valid state legislation. The other was the increasing scope for valid federal regulation, and therefore for overlapping federal law that would strike down state law.

Thus, in 1913, in the *Minnesota Rate* cases, it was held that direct regulation of foreign or interstate commerce by a state was prohibited. A state could, nonetheless, in the exercise of its taxing and police powers, regulate interstate commerce "incidentally," or "indirectly," subject always to congressional disallowance.[25] The police power is the power "to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community."[26] The reconciliation of this power with today's extraordinary scope of the federal commerce power in both interstate and intrastate trade will be discussed later.

The second development that restricted the scope of state legislation in interstate, and eventually in intrastate commerce, was the increasingly broad judicial interpretation allowing valid federal regulatory action. Until the early 1930s, Congress exercised its powers over interstate commerce mostly in relation to interstate transport by rail. The courts interpreted federal powers regarding interstate transport widely, but it was only in the late 1930s that this wide interpretation was extended generally to commerce in the sense of traffic, that is, the purchase and sale of commodities among the states. In the *Shreveport* case, in 1914, the Supreme Court, supplementing the commerce power with the "necessary and proper" clause of Art. 1, s. 8, para. 18, ruled that Congress may regulate local transport in order to make its control of interstate transport really effective.[27]

The first important piece of legislation to govern interstate traffic was the Sherman Anti-Trust Act of 1890, which made contracts and conspiracies in restraint of interstate and foreign trade illegal. It received a setback in the *Sugar Trust* case of 1895, which ruled that manufacture and production were distinct from commerce and the affair of the states. Therefore, if a contract concerned manufacture or production the effect on trade "would be an indirect result, however inevitable and whatever its extent," and it would be beyond the power of Congress.[28] However, this doctrine was largely abandoned in 1905, for anti-trust but not other legislation, by the adoption of the notion that an established "current of commerce" among the states could be protected from interruption by Congress.

In 1922 the Supreme Court made a sweeping endorsement of federal anti-trust jurisdiction:

> Whatever amounts to a more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judg-

> ment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effects upon it are clearly non-existent.[29]

The *Sugar Trust* distinction between production and commerce played a part in the demise of the 1933 National Industrial Recovery Act, which attempted to govern hours of labour and wages "on the theory, in part, that in the circumstances of the then existing emergency, they affected commerce among the states."[30] However, in 1937 the court upheld the Wagner Labor Relations Act of 1935, which requires employers, who are seeking an interstate market for their products, to permit their employees to bargain with them collectively. On that occasion the court declined any longer "to deal with the question of direct and indirect effects in an intellectual vacuum," and said that the question whether interstate trade was affected was one of fact and degree.[31] Two years later it was held that the new doctrine was applicable no matter how small the volume of commerce affected.[32]

In the important case of *United States* v. *Darby*, the Supreme Court in 1941 upheld the 1938 Fair Labor Standards Act, which prohibits interstate transport of goods produced by workers whose hours of work and wages do not conform to the standards imposed under the act, and which even prohibits the production of such goods "for commerce." The decision invokes both the commerce clause and the necessary and proper clause.[33] In previous years it was the rule that Congress was not ordinarily entitled to prohibit interstate commerce if that would enable it to control matters regulated by the states.

In 1942, the Supreme Court held that the Agricultural Adjustment Act validly regulates production even when the produce is intended wholly for consumption on the producer's farm, because the consumption meets needs that would otherwise be met in commerce. The court stated that:

> . . . questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce . . . . The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible.[34]

Thus, by this time the reach of the commerce clause extended into production and indirect effects on interstate and foreign commerce. How indirect and remote the effects subject to congressional control can be is illustrated in the following section.

## The commerce clause and government regulation

Because the U.S. Constitution was drawn up in 1787 it was unable to anticipate a number of the tasks central governments were to be called upon to fulfil in later years. The Constitution does not, therefore, give Congress in explicit terms powers that are specifically given to federal legislatures in the later constitutions of Canada, Australia and the Federal Republic of Germany. A number of these powers have, however, been judicially ascribed to the commerce clause, with the result, which has already been noted, that the commerce clause, supported by the necessary and proper clause, is the source of the most important peace-time powers of the national government.

The following examples illustrate the vast range of the commerce clause. It should be noted that, for the most part, it is only the powers which are given by the commerce clause that are mentioned under each heading, and not the powers given by other provisions of the Constitution.

### • Agriculture

The reach of the Agricultural Adjustment Act into production has already been noted. In 1942 it was held that congressional authority could reach farm produce grown and consumed on a prison farm in Ohio; and, in 1976, that the clearing of land for the purpose of growing grapes is a business that affects interstate commerce.[35]

Marketing schemes are usually operated under federal rather than state legislation, notably in the field of basic commodities (wheat, corn, rice, tobacco, cotton and peanuts), where participation of farmers is voluntary.[36] Federal activity also predominates in the marketing of other products such as fruits, vegetables and milk; in grading and sanitary inspection; and in disease control.

### • Banking

Banking is not mentioned in the Constitution. The states have residual jurisdiction concerning intrastate banking. Federal authority depends on other heads of the Constitution as well as the commerce clause.[37] The federal McFadden Act provides that banks are not allowed to have branches in other states unless those states agree, and it forbids banks to accept out-of-state deposits. The result of this and other measures, such as state usury laws that set a ceiling on the rate of interest for loans, is that banking is much less nationally integrated than in Canada. For example, a South Dakota law forbids operations that are a "substantial detriment" to existing banks in the state. This lack of integration is breaking down somewhat because of various recent developments, including the quasi-banking activities of credit card companies and brokerage houses.

- **Civil rights**

The accommodation provisions of the Civil Rights Act of 1964 were upheld in the famous *Heart of Atlanta Motel* case of the same year. The case is frequently mentioned as illustrating the long reach of the commerce clause, which enables Congress to legislate regarding interstate transactions that "affect the people of more states than one," to govern affairs "which the individual states, with their limited territorial jurisdictions, are not fully capable of governing."[38] The businesses in question in the *Atlanta* case "surely would have been regarded in earlier years as local businesses not subject to Congressional regulation under the commerce clause."[39]

- **Communications**

The following have been held to be "commerce":[40]

- the sending of information by telegraph
- radio broadcasting
- the gathering of news by a press association and its transmission to client newspapers.

The Federal Communications Commission, established in 1934, regulates radio, television (including cable), and telephones.

- **Company law and bankruptcy**

Company law is basically an area for regulation by the states. A Mississippi law does not allow "foreign" (out-of-state) corporations to maintain actions in the state courts without a certificate to do business in the state. Apparently, a state may validly require a certificate if the foreign corporation's business in the state is of a local or intrastate character. However, in a 1975 case the Supreme Court ruled that "Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce clause."[41]

Not only corporations may fall into bankruptcy; but it is convenient to mention here that bankruptcy is a concurrent power with federal paramountcy. Congressional authority is contained in Art. 1, s. 8, para.

4: "To establish . . . uniform laws on the subject of bankruptcies throughout the United States."

"Practically all classes of persons and corporations" are covered by federal bankruptcy law, as well as municipalities and other political subdivisions of the states.[42] The reference to uniform laws in the Constitution does not preclude Congress from fashioning legislation to resolve geographically isolated problems.[43]

Corporations are "persons" within the meaning of the 14th Amendment. An out-of-state corporation must therefore receive equal protection of state laws; but the "foreign" corporation must, in order to receive the state's protection, be "subject to the jurisdiction thereof." This means the state may require the corporation to fulfill certain responsibilities, such as to pay an appropriate share of taxes.[44] Taxation is discussed later.

There is some indirect federal regulation of corporations not only through the bankruptcy power but also through the commerce power in relation to the activities of the Securities and Exchange Commission.

### • Competition, including the professions

Some of the history of U.S. anti-trust legislation has already been traced. The Sherman Anti-Trust Act has been held to cover several activities in the amusement field: football; the promotion of boxing coupled with the sale of television, broadcast and film rights; and the booking and presenting of theatrical attractions.[45]

The court has held that a minimum fee schedule for lawyers enforced by the Virginia State Bar violated the act. It noted that "in holding that certain anti-competitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions."[46]

By virtue of the 1943 *Parker* case doctrine, anti-competitive behaviour carried out at the "legislative command" of a state is exempt from the Sherman act, because, the court said, the act was intended to regulate private practices and not to prohibit a state from imposing a restraint as an act of government.[47] However, in the Virginia lawyers case, the anti-competitive behaviour was not commanded by the state. An Arizona law that did command lawyers to restrict their advertising was struck down because it contravened the right of free speech in the First Amendment. It was held that the state could not prevent truthful advertising of routine legal services.

In a recent case, *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum*, it was held that a California statute, requiring wine producers and wholesalers to establish a resale price maintenance system, was in violation of the Sherman act. The court, in its decision on March 3, 1980, said that the state's policy was not "actively supervised" by the State itself. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of State involvement over what is essentially a private price-fixing arrangement."

In a January 8, 1980, decision the court held that the New Orleans Real Estate Board's agreement to charge a uniform commission on residential sales had a "not insubstantial" effect on interstate commerce.[48] This is a further illustration of the long reach of the commerce clause.

## • Crime

Criminal law is largely an area of state jurisdiction, but federal law can also impose criminal penalties. Two such laws supported by the commerce clause have been upheld by the courts. It is a crime for anyone who travels in interstate or foreign commerce to organize, encourage or carry on a riot, or with the intent to promote or carry on "any unlawful activity."[49] Kidnapping is a crime against the United States when the victim is taken across state lines.[50] Transport across state lines of stolen automobiles and other goods, of lottery tickets, and of impure or falsely branded foods is against federal law.

It has been held that section 1955 of the Organized Crime Act of 1970 is a valid exercise of the commerce power. The section makes the operation of "an illegal gambling business" a federal crime.[51] The section does not apply in states where gambling is legal. "There is no requirement of national uniformity when Congress exercises its power under the commerce clause."[52] Congress could therefore presumably confine the sale of a product such as imported oil to a certain part of the country.

The Second Amendment states that ". . . the right of the people to keep and bear arms, shall not be infringed." However, the amendment guarantees a collective not an individual right to bear arms, and there are state and federal regulations, including the federal Gun Control Act of 1968.[53] There is current pressure for more effective federal control, and this would presumably be implemented under the commerce clause.

- **Environmental protection**

U.S. district courts have held that both air and water pollution affect interstate commerce. Federal jurisdiction over water pollution is not limited by the "navigable" waters test in its authority under the commerce clause.[54]

The U.S. Court of Appeals has held that the Environmental Protection Agency exceeded its authority under the Clean Air Act in requiring Maryland to establish certain anti-pollution programs. It held that the commerce clause, on which the act is founded, did not empower Congress or a federal agency to direct a state legislature to legislate.[55]

The Endangered Species Act of 1973, which prohibits interstate trade in products made from whales, has been upheld as a valid exercise of the commerce clause. The power of Congress to prohibit products under the clause is well established. It may "exclude from the channels of interstate commerce those products whose movements between the States the Congress deems harmful to the national welfare."[56]

- **Government purchasing policy**

This is discussed below, under the heading, "State sovereignty."

- **Insurance**

In a 1944 decision of the Supreme Court, supported "by only a bare majority of the seven Justices participating in it," it was held that the Sherman act applied to fire insurance transactions carried on across state lines, although when the act was passed in 1890, and for long afterwards, it was the doctrine of the court that the business of insurance was not "commerce" in the sense of the Constitution.[57] Early in 1945, Congress passed the McCarran act, which provides that the insurance business shall continue to be subject to the laws of the several states except as Congress may specifically decree otherwise.[58]

Insurance companies must be licensed in every state in which they do business.[59]

- **Labour legislation and wage controls**

Federal activity in the labour field, sustained by the commerce clause, appears greatly to exceed such federal activity in Canada. Reference has already been made to the Wagner Labor Relations Act, which requires employers seeking an interstate market for their products to allow their employees to bargain with them collectively. However, the Taft-Hartley Law allows states to outlaw compulsory union membership; the use of such authority by states, notably in the South, has played an important part in attracting industrial investment.

The Fair Labor Standards Act has been interpreted in such a way that it places "the whole matter of wages and hours of persons employed in the United States, with slight exceptions, under a single federal regulatory scheme and in this way . . . supersedes state exercise of the police power in this field."[60]

Three examples, given by Corwin, of workers to whom the act applies, show that a worker's connection with interstate commerce need only be remote for him to be brought under the act:

- building caretakers who provide heat to warm the fingers of seamstresses employed by a clothing manufacturer who rented space in the building and who sold goods interstate

- maintenance employees of the central office building of a manufacturing corporation engaged in interstate commerce in a product coming from plants located elsewhere

- employees of a window-cleaning company, doing most of its work on the windows of industrial plants producing goods for interstate commerce.[61]

In the early 1970s there was a presidential price and wage freeze, based on a 1970 statute of Congress.

The federal Department of Labor also administers the Employment Retirement Income Security Act (ERISA), which among other things prescribes what securities employees' pension funds may invest in. The Pension Benefit Guaranty Corporation insures pension plans established by one employer or by a group of employers for employees.

Various conditions regarding labour hiring practices are attached to federal grants to the states and local authorities.

### • Natural resources

In *West* v. *Kansas Natural Gas* (1911) the Supreme Court struck down an Oklahoma prohibition on the out-of-state shipment of natural gas found within the state. The court reasoned that if the state could so prefer its economic well-being to that of the nation as a whole, "Pennsylvania might keep its coal, the northwest its timber, and the mining states their minerals," so that "embargo may be retaliated by embargo" with the result that "commerce would be halted at the state lines."[62]

The decision in the *West* case determined the court's approach in *Pennsylvania* v. *West Virginia* (1923) where it struck down a West Virginia statute that "effectively" required natural gas companies to satisfy home state needs before the needs of other states.

In *Foster Packing Co.* v. *Haydel* (1928) the court "limited the extent to which a state's purported *ownership* of certain resources could serve as a justification for the state's economic discrimination in favour of residents." It invalidated a Louisiana law that required local processing as a prerequisite to out-of-state shipment.[63]

The fact that a state-owned resource is destined for interstate shipment does not of itself prevent a state from preferring its own residents in the utilization of the resource, but it does "inform the court's analysis" of any discrimination brought before it for examination. In the case of *Hicklin* v. *Orbeck* (1978) the court noted that "the oil and gas upon which Alaska hinges its discrimination against non-residents are of profound national importance."[64]

- **Price controls**

"Congress, subject no doubt to the due process clause of Amendment V, may regulate the prices of commodities sold in interstate commerce, and even the local prices of commodities which affect the interstate prices thereof. Indeed, the power to regulate rates of transportation sometimes carries with it the power to regulate the price of the commodity transported, as in the case of gas and electric power."[65]

- **Public utility holding companies**

The Public Utility Holding Company Act (Wheeler-Rayburn Act) of 1935 required certain companies to register with the Securities and Exchange Commission, and to disclose to the Commission various information, or be denied the use of the facilities of interstate commerce and the mails.[66]

- **Securities regulation**

The Securities Exchange Act of 1934 established the Securities and Exchange Commission and closed the channels of interstate commerce and the mails to dealers refusing to register under the act.[67]

The result is that regulation of the stock exchanges and of companies whose securities are publicly traded is almost wholly federal. Many brokers, investment dealers and investment advisers also are federally regulated.

- **Standards: health, safety and technical**

Congress has authority, if it wishes to use it, to legislate standards on all matters affecting interstate commerce. Food and drug legislation is mostly federal, and there is a federal Fair Packaging and Labelling Act.

Federal legislation does not, however, cover the whole field. For example, questions have been raised recently about the effects on health of urea formaldehyde insulation pumped into the walls of buildings. In the absence of federal legislation, the states are acting individually to cope with this problem.

- **Transport**

It was established well before the 1930s that not only railroads but also other forms of transport were subject to the interstate commerce power, but it was not until then that Congress moved to regulate such transport as highway carriers and aircraft. Federal authority over pipelines was established at an early date.[68]

Federal power over navigation, which is a branch of transport and so of commerce,[69] includes power to erect dams. Any electrical power so produced is "property belonging to the United States". Congress may help to create a market for the power by extending loans to municipalities. And it may even build thermal plants that are connected to a hydro scheme, all under the commerce power.[70]

A state may not regulate rates of transportation for goods crossing the state border; and while it may regulate intrastate rates, such rates "are subject to be set aside by national authority if they discriminate against or burden interstate commerce".[71] Federal law precludes a state from suspending the right of an interstate carrier to use the state's highways for interstate goods because of the carrier's repeated violation of certain state regulations. The state's remedy lies in an appeal to the Interstate Commerce Commission.[72]

The 55-miles-per-hour speed limit is imposed by Congress as a condition of certain grants. One state supreme court has even suggested that the speed limit may be a valid use of the commerce power.[73]

## The Court's arbitral role regarding taxation and the states' police power

It was noted earlier that an 1851 decision established that Congress has exclusive jurisdiction in interstate trade where uniformity is imperative, and that the states may not legislate in that area even when Congress has not occupied the field. In this sense, the rule acts as a guarantee of free trade comparable to Australia's section 92. On the other hand, it was noted that the states could legislate where diversity is necessary to meet local commercial needs, subject always to being overridden by Congress.

These general principles are given practical application by the court arbitrating between the need for freedom of trade, except so far as Congress may choose to restrain it, and state legislation. In this role the court acts as "an arbitral or quasi-legislative body."[74] Corwin quotes Justice Black in 1944: ". . . the primary test applied by the court is not a mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated." Corwin proceeds to illustrate how this arbitral role is carried out with regard to two areas of state activity: taxation, and use of the police power.

### • State taxation affecting commerce

A sale of goods intended for shipment to another state may not be taxed, though their production may be, "and the line is not always an easy one to plot."

A state may levy on corporations (as on professional persons) a tax for the privilege of doing business in the state, but the tax must not be discriminatory or constitute an undue burden on interstate commerce. However, it was noted by Justice Blackmun in 1977 that the judgment as to whether such a state tax, in relation to a company's interstate commerce, is permissible, represents a "perennial problem," and other Justices commented that the Court's decisions over a period of 30 years had failed to distinguish clearly between what offends the commerce clause and what does not.[75]

Corporation tax is a difficult area for all concerned. The revenues from taxes levied on a corporation engaged in interstate commerce must ordinarily be "fairly apportioned" among the states concerned. The court in making a judgment looks, among other things, at the "opportunities and protections which a state has afforded." It was suggested in 1937 that instead of the apportionment test, which gives uncertain results, a more usable test might be to ask what would happen to the interstate commerce if "every state which the commerce touches" were to act in the same way. However, the apportionment test survives.[76] The courts make a judgment as to what is a state's fair share.

Recent developments confirm that this is a difficult area that business, in particular, is unhappy with. Early in 1980 the court ruled that Vermont could take Mobil's dividends from foreign affiliates into account in calculating the company's state tax. There is, however, a lack of uniformity on such matters among the states that do levy a corporation tax. A bill was introduced in Congress to forbid states to take into account income not included on a corporation's federal income tax return.[77] Presumably, the commerce clause would give Congress power to pass such a law.

A different kind of situation arises as a result of the severance taxes imposed by states on the extraction of natural resources such as oil and gas. Kaden points out that these taxes are, in effect, no different from state export taxes, and that export taxes would be clearly unconstitutional. Congressional authority to curtail severance taxes that exceed reasonable revenue-raising for local needs is, he says, not entirely clear.[78]

Some light was thrown on this question by a 1981 decision. The Supreme Court ruled, in a case brought by Commonwealth Edison and others, that there is no limit to the amount of severance tax that Montana may levy on each ton of coal mined in the state, because the tax is levied regardless of destination. Most of the coal is mined on federal land and virtually all is shipped to other states. A federal law leaves states free to levy taxes on lessees of federal lands, and Congress could, if it wished, impose a limit on these taxes.[79]

### • The states' police power

The 10th Amendment says that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." For about 100 years after the 1830s the amendment "was frequently invoked to curtail powers expressly granted to Congress, notably the powers to regulate interstate commerce, to enforce the Fourteenth Amendment, and to lay and collect taxes."[80] However, today "it is apparent that the Tenth Amendment does not shield the States nor their political subdivisions from the impact of any authority affirmatively granted to the Federal Government."[81] A legitimate use of the commerce power will override the states' police power, which as already noted is the power to promote the health, safety, morals and general welfare of their inhabitants. In a 1977 judgment, the Supreme Court stated the principle that when Congress has unmistakably ordained that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall.[82]

The court's role with regard to the states' police power is, "even more emphatically than in the taxation field, that of an arbitral, rather than of a strictly judicial, body."[83] In a 1963 judgment, the court stated a general rule for determining the validity of state statutes affecting interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on State activities.[84]

For example, a federal district court upheld a local ordinance regulating noise levels at an airfield, because, in relation to that airfield, there was only an incidental burden on interstate commerce.

Also, in the 1978 case of *Exxon* v. *Maryland*, a state law was upheld that prohibited gasoline refiners from operating company-owned service stations. The company had argued that it would have to train independent dealers and that this burdened interstate commerce.

A state law which is clearly discriminatory in intent will be struck down. For example, a North Carolina law attempted to protect local producers of apples from competition from out-of-state apples by requiring that only U.S. Department of Agriculture (USDA) grades, or no grade whatever, should be shown on closed containers of apples sold in the state (USDA grades are voluntary). This hurt, and was intended to hurt, producers in the State of Washington that use a widely accepted grading system of their own. The law was held to discriminate unconstitutionally against interstate commerce.

However, the court appears to be taking the position, which Kaden says is not sensible or realistic, that the reach of state regulatory power over commerce turns on the question of whether the state owns the product being traded. In the absence of relevant federal legislation, South Dakota's right to exclude out-of-state customers from purchasing cement produced by the state-owned plant was upheld in June 1980.[85]

The court decided in 1976 that a mandatory reciprocity requirement "unduly burdens the free flow of interstate commerce and cannot be justified as a permissible exercise of any state power." The Mississippi Board of Health had said that milk from another state could be sold in Mississippi provided the other state accepted Mississippi milk on a reciprocal basis. Mississippi had argued that the regulation would maintain the state's health standards.[86]

The Supreme Court in its arbitral role looks not only at the question of whether a state has impinged unduly on "the field of power which the commerce clause is thought to reserve to Congress exclusively," but also at the question of whether a state statute conflicts with any federal law that is a valid exercise of the commerce power. If it does so conflict, it must fall.[87]

Corwin suggests that the arbitral role is a difficult one for the court to play, and he quotes a 1940 dissenting opinion of three justices:

> Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution.[88]

## State sovereignty

### • The *National League of Cities* case

> The post-1937 judicial view of State sovereignty has generally required the States to look outside of the court-room for protection of their interests. However, sensitivity to state sovereignty has become a frequent, if somewhat erratic, reference point for the Supreme Court in the 1970s. . . . The court's renewed solicitude for state sovereignty reached its height in 1976. The decision in *National League of Cities* v. *Usery* struck down the extension of the minimum wage and maximum hour standards of the (federal) Fair Labor Standards Act to State and local government employees. Previous decisions had effectively remitted the States to the protection of the political branches whenever Congress sought to exercise its commerce power to regulate them. As long as the subject of a regulation was within reach of the commerce power, the federal directive could be applied to the States in the same manner as to private persons engaged in similar activity.[89]

According to Kaden, the *National League of Cities* majority decision "proposes a substantive constitutional limitation on the commerce power." However, in his view, neither the opinions of the justices who concurred in the decision nor the opinions of the dissenting justices contribute much to the goal of a workable rule of decision, i.e., a rule that can be a useful guide in other cases regarding state autonomy.

The *National League of Cities* decision held that the determination of employment conditions for state employees was an "undoubted attribute of State sovereignty," and therefore merited the court's protection from federal intervention. The court found a means for the decision "to co-exist, however uncomfortably, with the application of federal safety regulations, tort liability, and employment standards to state-operated railroads. . . . As the *National League of Cities* majority would have it, the state-operated railroad is subject to federal commerce regulations, while the State hospital or school is immune."[90]

The court's earlier decision in *Fry* v. *United States* upheld Congress's power to include state employees within the national wage freeze. One justice argued that the difference in *Fry* was that "the wage and price controls were temporary in duration, negative in direction (and thus without adverse fiscal impact on the state budget), and responsive to an evident national emergency."

Kaden is not impressed by the efforts of the court to reconcile the decision with earlier ones. He argues that the court should not have intervened on the states' behalf in the *National League of Cities* situation, because "neither the fiscal nor the governmental impact of fair labour standards, nor the temporary incomes policy tested in *Fry*, significantly alters a state's political process." There is more of a case, he believes, for intervening with regard to the conditions in many federal spending programs "that currently have significant impact on state budgetary choices."

### • Conditional grants

The court in *National League of Cities* limited its holding to the powers of Congress under the commerce clause, and in a footnote said that it expressed no view as to the validity of Congress achieving its purposes under other sections of the Constitution such as the spending power.[91] In Kaden's view it would have been quite possible for Congress to have required compliance with the Fair Labor Standards Act as a condition for the receipt by the states and 38,000 local governments of revenue-sharing funds.

Not long after the *League of Cities* decision was handed down, the court upheld the imposition of a federal grant condition which had the effect of requiring the State of North Carolina to amend its constitution before it could receive health grants. Under the National Health Planning Act a state, to receive grants, must regulate both private and public health care facilities and services to ensure that only needed facilities and services would be offered or developed in the state. In North Carolina the State Supreme Court had ruled that the creation and operation of a certificate of need mechanism for private health care institutions was incompatible with the state constitution. The U.S. Supreme Court, in ruling that the grant condition did not cross the line from inducement to coercion and thus violate the 10th Amendment, stated the following:

> Simply because one State, by some oddity of its Constitution may be prohibited from compliance is not sufficient ground . . . to invalidate a condition which is legitimately related to a national interest . . . any State . . . could thwart the congressional purpose by the expedient of amending its Constitution or by securing a decision of its own Supreme Court. The validity of the power of the federal government under the Constitution to impose a condition on federal grants made under a proper constitutional power does not exist at the mercy of the State Constitution or decisions of State Courts.[92]

According to Thomas Madden, the Supreme Court in this case "served notice that it was not inclined to test the theoretical or practical limitations that the 10th Amendment places on Congress's power under the taxing and spending clause to induce state action in furtherance of the general welfare of the nation."[93]

In a 1947 case it was held that a grant condition was legitimate that prohibited any appointed state or local government official from participating in partisan politics if his or her salary came in whole or in part from federal grants.

The previous paragraphs have digressed from the subject of the commerce clause to show that, even where the clause is subject to a limitation, there is an alternative route for Congress to follow. Besides, the limitation itself is not without controversy. The decision in *National League of Cities* was by five votes, to four against. In dissent, Justice Brennan described the court's decision as a "patent usurpation of the role reserved for the political process" and "mischievous." He continued: "The only analysis even remotely resembling that adopted today is found in a line of opinions dealing with the commerce clause and the tenth Amendment that ultimately provoked a constitutional crisis for the Court in the 1930s."[94]

Nevertheless, the court's decision influenced subsequent congressional debates on no-fault insurance and on the extension of collective bargaining rights to state and local government employees.[95]

- **State and local government purchasing preferences**

These preferences are widespread, favouring both American products against foreign products, and local products against non-local products.[96] It seems evident that the treaty power could be used by Congress, given the political support to do it, to prohibit discrimination against foreign goods. The U.S. treaty power is a substantive power and not merely auxiliary to other delegated powers. It seems also likely that the commerce power could be used—again, given sufficient political support in Congress—to prohibit or regulate local purchasing preferences that discriminate against other American products or against foreign goods. In the court's 1975 decision in the *Fry* case regarding federal emergency control of state and local wages, the court stated that "even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations."

In some cases a preference is given to minority groups. The Public Works Employment Act of 1977 prohibits the Secretary of Commerce from making grants to local governments unless they provide assurances that at least 10 per cent of each grant be expended for minority business enterprises. Minority group members for the purposes of the act are citizens who are Negroes, Spanish-speaking Americans, Orientals, Indians, Eskimos, and Aleuts.[97]

- **State and local government subsidies**

In a 1976 case relating to a Maryland scheme for giving bounties to metal scrap processors who destroy abandoned automobiles, the Supreme Court, upholding this exercise of the state's police power, stated that "nothing in the purposes animating the commerce clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[98]

The words "in the absence of congressional action" suggest that Congress has the power under the commerce clause to prohibit state and local subsidies that discriminate. The quotation from the *Fry* decision given above suggests that *any* subsidies could be prohibited if they "affect commerce." It is quite likely Congress could, under the commerce power, prohibit subsidies that are designed to attract industry to locate. The treaty power could also be used. In both cases, the problem would be one of political support in Congress rather than legal capacity.

## INTOXICATING LIQUORS AND CIGARETTES

The 21st Amendment repealed the 18th, which had established prohibition, and it gave the states special jurisdiction over interstate trade in this field. The second paragraph reads as follows:

> 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.

A 1972 decision of the Supreme Court regarding a South Carolina tax on an out-of-state corporation confirmed that the amendment frees a state from "traditional commerce clause limitations" with regard to intoxicants destined for use within its borders.[99]

Before the 21st Amendment, Congress had, by the Webb-Kenyon Act of 1916, subjected interstate shipments of intoxicants to regulations by the state of destination, thereby in effect delegating power over such interstate commerce to the states.[100] Federal laws on intoxicating liquors are not altogether prohibited by the amendment.

The rates of state taxes on cigarettes in May 1977 varied between two cents per pack of 20 in North Carolina to 23 cents in New York City. For some states, cigarette smuggling creates a serious tax evasion problem. Such smuggling is not a federal offence, and there has been federal resistance to make it one, which is the solution urged by many states. In most states it is a crime to possess, transport, deliver, or sell improperly stamped cigarettes, but for various reasons state laws are not in some areas of the United States a sufficient deterrent to smuggling.[101]

States may not tax goods in transit, but they may tax in a non-discriminatory way goods brought in from another state or from abroad. At one time transactions involved in interstate commerce could not be taxed, but in 1937 it was held that states could levy "compensating taxes" upon the use within their territory of articles brought in from other states.[102]

## THE FREE MOVEMENT OF PEOPLE

The principal sources for these notes are the works of Corwin, Pannam and Heldman that are listed on pages 75 and 76.

## Constitutional provisions: summary

The freedom of movement in question is the freedom to settle or reside in, or simply visit, another state. Several constitutional provisions are relevant. The commerce clause covers not only commerce but intercourse and the mere passage of people between states. Restrictions imposed on anyone travelling interstate by federal criminal law have already been noted. The three constitutional rules to be considered now are non-discriminatory application of state privileges and immunities, the right to travel, and the obligation of states to give to all within their jurisdiction the equal protection of the laws.

The first rule is expressed in Article IV, section 2 of the Constitution. It obliges a state to treat residents of other states in the same way that it treats its own residents. The second rule, the right to travel, is not to be found in the text of the Constitution itself but in judicial decisions. It binds both the federal government and the states. The third rule, the equal protection clause, is contained in the 14th Amendment. It obliges a state to treat all its residents alike, including, for most purposes, aliens. The clause has been invoked to invalidate state laws that confine state benefits to people who have been resident in the state for a prescribed minimum period.

All three of these constitutional rules have been applied to strike down, or to allow, discrimination based on the simple fact of residence or on the length of residence. Some examples are given in the following pages. The overall result is that discrimination will be allowed if it is not hostile or unreasonable.

## Art. IV, s. 2: state privileges and immunities

The first paragraph of Article IV, section 2 reads as follows:

> The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

The wording is capable of various meanings, but the courts have interpreted it to mean that a state is forbidden from discriminating against citizens of other states in favour of its own. "The possibility of such discrimination was thought to be inconsistent with the nature of the federal system that was being created." The primary purpose of the clause "was to help fuse into one nation a collection of independent, sovereign states."[103]

In 1869 the Supreme Court in the case of *Paul* v. *Virginia* noted that "It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of this kind . . . the Republic would have consisted of little more than a league of States."

The article was based on Article IV of the earlier articles of Confederation, which is more felicitous in its wording:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively. . . .

The wording of the present article uses the term "citizens." Today, one automatically becomes a citizen of a state if one is domiciled in a state, that is, in effect, permanently resident. Citizenship (or domicile) and simple residence have not always been considered as equivalent in the court's decisions regarding Article IV, section 2. However, the terms citizen and resident are now considered to be essentially interchangeable for the purposes of the privileges and immunities clause.[104]

For the purposes of Article IV, the term "citizens" excludes corporations. In this sense it is different from Article III, section 2, which establishes the judicial power to settle controversies between citizens.[105]

In *Ward* v. *Maryland* (1871), the Supreme Court held that Article IV "plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the union for the purpose of engaging in lawful commerce, trade, or business without molestation."[106]

The privileges and immunities that are the subject of Article IV are those which pertain to the citizenship of the state in question, and not to U.S. citizenship in general. The latter are covered, for example, by the Fifth and 14th Amendments. Article IV is enforceable only against the states, and not against the U.S. government or the governments of U.S. territories. Also, it is enforceable only with respect to government rather than private actions.

Thus, once a state has established, at its discretion, certain privileges and immunities for its own citizens, these privileges and immunities must as a general rule be extended without discrimination to the citizens of other states who come to visit or take up residence.

There are exceptions. The article "does not preclude disparity of treatment in many situations where there are perfectly valid independent reasons for it," and where the degree of discrimination bears a close relationship to those reasons.[107] As long as the laws in question "are not hostile and reflect a reasonable attempt to secure a substantial equality between the two groups or to protect a legitimate state interest they will not violate Article IV, section 2."[108]

- **Examples of the application of Art. IV, s. 2**

The following measures have been held not to contravene the privileges and immunities clause:[109]

- The courts upheld a Massachusetts statute relating to the legal status of non-residents using the state's highways. It was noted that the statute in effect put non-residents on the same footing as residents.

- State universities may charge out-of-state residents higher fees than residents.

- A Connecticut statute requiring non-resident shareholders of corporations carrying on business in the state to pay a wealth tax was upheld. The tax was 1.5 per cent of the value of their shares, and was paid through the corporation. Residents paid taxes on their shareholdings to their local governments, although the percentage varied. The Supreme Court decided the 1.5 per cent was fair, and that there was no intentional discrimination. A balance of burdens had been achieved.

- A non-resident may be required by a state court to give security for costs, even though the requirement does not apply to residents.

- States may prescribe for the professions tests of professional competence and a requirement that those who practise must reside in the state. They may also prescribe a minimum period of residence, provided that it not be arbitrary or unreasonably long. "There must be a reasonable relationship between the nature of the discrimination involved and the legitimate interests of the state in regulating and policing the professions."

- States may restrict to residents the grant of licences to sell liquor.

- States may limit the right to vote or hold public office to their own citizens.

Decisions in the lower courts have held that a state may give preference to its residents where state government employment is concerned without infringing Article IV, section 2. In 1975 the Illinois Supreme Court arrived at such a conclusion with regard to public works projects.

However, it would be "dubious" to assume that a state may validly attempt to alleviate its unemployment problem by requiring private employers within the state to discriminate against non-residents.[110] In 1972, Alaska passed a law, which became known as the Alaska Hire statute, to remedy the state's "uniquely high unemployment." The law provided that whenever the state was a party to an oil or gas lease, or a right-of-way permit for an oil or gas pipeline, the lease or permit must contain a requirement that qualified residents of Alaska be hired in preference to non-residents. To be a qualified resident, one had to reside in the state for a year. The employment covered by the statute was wide: "all employment which is a result of" the oil and gas leases and right-of-way permits. The regulations implementing the law required that all non-residents be laid off before any resident working in the same trade or craft. The law was attacked under Article IV and under the equal protection clause of the 14th Amendment. The Supreme Court, in *Hicklin* v. *Orbeck* (1978), found the preference for residents, whatever their length of residency, constitutionally invalid.[111]

The court took exception to a number of the statute's provisions, including the wide field of employment covered and the fact that all qualified residents and not just the unemployed were given preference. It noted that the state's high level of unemployment had not been caused by an influx of non-residents. The court observed that, even if a law were more closely tailored to aid the unemployed, any attempt to force employers to discriminate against non-residents might "present serious constitutional questions."[112]

A state may not unfairly discriminate by taxation or other means against out-of-state citizens who may wish to acquire and hold real and personal property in the state. There must be a fair equalization of burdens between state citizens and out-of-state citizens.[113]

In 1972, the Supreme Court struck down durational residency requirements for voting (presumably in ordinary rather than in primary elections) as being contrary to the right to vote.[114] In 1975, a federal district court held that a New York statute that established an 11 month minimum residency requirement to vote in a primary election was unconstitutional; the statute apparently contravened Article IV, section 2.[115]

## The right to travel

The right to travel[116] is not to be found in the Constitution itself, but derives from judicial interpretation. Previously obscure, it was given prominence when the Supreme Court in the 1969 case of *Shapiro* v. *Thompson* found against state one-year residency requirements for welfare recipients. The court said the right was fundamental and could be infringed only by laws that pass certain strict tests. The constitutional sources for the right to travel have not been precisely identified by the courts.

In the 1958 case of *Kent* v. *Dulles*, the Supreme Court said the right to travel is part of the "liberty" mentioned in the Fifth Amendment. The amendment, adopted in 1791, provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

In a 1900 case the word liberty as used in the amendment was held to include "the right of the citizen . . . to live and work where he will; to earn his livelihood by any lawful calling. . . ."

The interstate commerce clause of Article I and the 14th Amendment have also been invoked as a basis for the right to travel.

In *Shapiro* v. *Thompson* (1969), the Supreme Court ruled that state durational residency requirements for welfare recipients violated the equal protection clause of the 14th Amendment, because they had the effect of deterring the entry of indigent persons into the state, thereby impermissibly abridging their fundamental constitutional right to interstate travel. In the same decision the court established that a state regulation affecting interstate travel would be invalidated unless it were "shown to be necessary to promote a compelling governmental interest."

### • Application of the right to travel

The courts have been reluctant to accept the right to travel argument against any state practice except residence requirements. When faced with the assertion of the right, the courts analyse the disputed legislation in five steps:

1. The court determines whether the legislation establishes a classification. An example of such a classification is one that distinguishes persons who have resided in the state for one year from those who have not.

2. If there is a classification, the court determines the extent to which the classification burdens the right to travel of one class and not the other.

3. If the burden is slight, the court applies the traditional equal-protection-of-the laws test, to determine whether the classification is arbitrary, in which case the legislation is unconstitutional, or if it bears a rational relationship to the purpose of the legislation. Usually, this test is not difficult to pass.

4. If the burden is sufficient to penalize the exercise of the right to travel, the court applies the strict equal-protection test: that is, it asks whether the state is promoting a compelling State governmental interest by burdening the right.

5. If the state can prove a compelling interest, it must then show that the interest cannot be promoted by any less restrictive measure.

State measures which have been found to impinge on the right to travel include the following: [117]

- state and Washington D.C. durational residency requirements for welfare recipients[118]

- an Arizona statute that required a year's residence in a county before an indigent could receive non-emergency hospital or medical care at the county's expense.[119]

In the second case noted above the question of intrastate freedom to travel did not arise in the particular situation before the Supreme Court. However, a lower federal court has struck down a five-year city residency requirement for admission to public housing.[120] The court observed that the Supreme Court in the *Shapiro* case had ascribed the right to the Constitution generally and not specifically to the commerce clause: "To the extent that the right to travel derives from 'our constitutional concepts of personal liberty' . . . it is not dependent on the crossing of state lines, but encompasses movement within a State as well."[121]

In the Arizona case relating to health care the court noted that a compelling interest did not, in the particular circumstances of the case, consist of the conservation of the taxpayers' purse, nor of administrative convenience.

The Supreme Court has, however, upheld Iowa's one-year residency requirement which applies to those who wish to initiate divorce proceedings. "Iowa's residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience." These grounds included Iowa's wish to avoid becoming a "divorce mill" and consequent attack on its divorce decrees.[122]

Lower courts have upheld "a simultaneous residency requirement imposed on those who are employed in city government."[123]

The lower courts have upheld a number of other state statutes as being consistent with the right to travel.[124] These include the following:

- a Virgin Islands bar requirement that a bar applicant promise to reside and practise law in the Virgin Islands a certain length of time after admission
- a Tennessee law that charges out-of-state students higher tuition fees
- a New York law that limits certain scholarships to students who graduate within the state
- a Montana law exempting graduates of the state university's law school from taking the bar exam before admission to the bar.

These lower court decisions also included three others in which it was assumed that the right to travel covers intrastate as well as interstate travel.

In one instance the Supreme Court in 1964 struck down a U.S. government regulation. In the interest of national security the regulation prevented registered Communists from obtaining a passport. However, in 1981 the court ratified the state department's revocation of the passport of Philip Agee, a former Central Intelligence Agency employee who was alleged to be trying to disrupt the agency's operations.[125]

### Equal protection clause

The equal protection clause of the 14th Amendment says that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."

In the *Shapiro* case mentioned above, the state durational residency requirements were actually imposed on the states by the provisions of a federal grant program, called Aid to Families with Dependent Children (AFDC). Its provisions limited eligibility for AFDC welfare benefits to individuals who had lived in a state for one year. The court held that the Social Security Act which established the AFDC program could not support such provisions: "Congress is without power to enlist state co-operation in a joint federal-state program by legislation which authorizes states to violate the Equal Protection Clause."[126]

The court therefore struck down the relevant provisions of the federal grant program as well as the state residency requirements.

It has been noted that in 1975 the Illinois Supreme Court held that a state law giving preference to employment of Illinois residents on public works projects did not violate the privileges and immunities clause.[127] However, the court held in the same decision that preference against employment of resident aliens on public works projects violates the equal protection clause. The result is that a state may in such a matter give preference to aliens resident in the state over U.S. citizens resident in other states. A recent press report says that state laws excluding aliens from the civil service and from the bar have been held unconstitutional.[128]

# WORDING OF RELEVANT CONSTITUTIONAL ARTICLES

Article I, Section 8

1. The Congress shall have power: To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;
2. To borrow money on the credit of the United States;
3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;
4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
5. To coin money, regulate the value thereof, and of foreign coins, and fix the standard of weights and measures;
6. To provide for the punishment of counterfeiting the securities and current coin of the United States;
7. To establish Post Offices and Post Roads;
8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
9. To constitute tribunals inferior to the Supreme Court;

17. To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;—And
18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Article I, Section 9

4. No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.
5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

Article I, Section 10

2. No State shall, without the consent of the Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

Article IV, Section 2

1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Article VI, Section 2

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 14

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 21

2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.

# NOTES TO TEXT

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1. Lewis B. Kaden, "Politics, Money and State Sovereignty: the Judicial Code," *Columbia Law Review*, 1979, p. 847.

2. Ibid., p. 868.

3. The criteria for grants under approximately 40 federal programs do, however, take into account differences in state income levels.

4. Thomas J. Madden, "The Law of Federal Grants" (Paper prepared for ACIR Conference on Grant Law, Washington, D.C., December 1979), p. 5.

5. Ibid. Compare the argument of certain Canadian provinces today that Parliament cannot tax exports from provincially-owned gas deposits.

6. Madden, p. 11.

7. Lewis B. Kaden, "Federalism in the Courts: Agenda for the 1980s," mimeographed, July 1980, p. 2.

8. Kaden, "Politics, Money and State Sovereignty," p. 889.

9. Carl W. Stenberg, "Federalism in Transition: 1959-79," *Intergovernmental Perspective*, Winter, 1980. Advisory Commission on Intergovernmental Relations, Washington, p. 7.

10. The "revenue-sharing grants" have certain broad conditions attached, so that no grants are entirely without strings.

11. This has some parallels with what happened in Australia under Prime Minister Whitlam, whose political support was heavily concentrated in urban areas.

12. Stenberg, p. 6.

13. Madden, p. 3.

14. Ibid., pp. 12, 36.

15. Ibid., p. 19.

16. Stenberg, p. 6.

17. Kaden, "Politics, Money and State Sovereignty," pp. 880-881.

18. *The Economist*, December 13, 1980.

19. *Newsweek*, September 17, 1979.

20. Edward S. Corwin, *The Constitution and What It Means Today*, (Princeton: Princeton University Press, 1978), p. 77.

21. Kaden, "Federalism in the Courts," pp. 47-48.

22. Corwin, p. 67.

23. Ibid., pp. 67-68. In "Federalism and the Courts," p. 1, Kaden notes, quoting Professor Wechsler, that an earlier proposal at the constitutional convention was to give Congress the responsibility for vetoing "state enactments deemed to trespass on the national domain," but the method of judicial review was chosen.

24. Corwin, p. 69.

25. Ibid.

26. Court definition of 1914, quoted in Corwin, p. 140.

27. Corwin, p. 53.

28. Ibid., pp. 57-58.

29. Ibid., p. 58.

30. Ibid., p. 62.

31. Ibid.

32. Ibid.

33. Ibid., p. 65.

34. *Wickard* v. *Filburn*, 1942. Quoted in Corwin, p. 66.

35. Kaden, "Federalism in the Courts," p. 29 and Corwin, p. 66.

36. In Australia, the wheat marketing scheme is compulsory.

37. Including Article 1, section 8, paragraphs 2, 5 and 6.

38. Corwin, p. 47.

39. Ibid.

40. Ibid.

41. Ibid., p. 59.

42. Ibid., pp. 93-94.

43. Ibid., pp. 94-95.

44. Ibid., p. 516.

45. Ibid., p. 59.

46. *Goldfarb* case of 1975, quoted in Corwin, pp. 59-60.

47. Corwin, p. 59. Corwin does not say whether, by an appropriately drafted law, Congress could prohibit state-commanded anti-competitive behaviour. Presumably Congress could, provided the essential elements of state sovereignty are not impinged. See later section of this paper on state sovereignty.

48. *McLain* v. *Real Estate Board of New Orleans Inc.* The court was not asked to rule on whether the Sherman Act had in fact been violated.

49. Corwin, p. 49.

50. Ibid., p. 64.

51. Ibid.

52. Ibid., p. 50.

53. Ibid., pp. 340-341, 359.

54. Ibid., pp. 49-50, 57.

55. Ibid., p. 50.

56. Ibid., p. 64.

57. Ibid., p. 59.

58. Ibid., p. 82.

59. *The Economist*, October 25, 1980, p. 23. Survey of foreign capital investment in the United States.

60. Justice Roberts in 1951, quoted in Corwin, p. 65.

61. Corwin, p. 65.

62. U.S. Supreme Court Reports, 57L Ed 2d, p. 408.

63. Ibid., p. 409.

64. Ibid.

65. Corwin, pp. 62-63.

66. Ibid., pp. 66-67.

67. Ibid., p. 66.

68. Ibid., p. 54.

69. Ibid., p. 55.

70. Ibid.

71. Ibid., pp. 77-78.

72. Ibid., p. 82.

73. Ibid., pp. 48-49.

74. Ibid., p. 69.

75. Ibid., pp. 72-73.

76. Ibid., pp. 73-74.

77. *The Economist*, March 29, 1980.

78. Kaden, "Federalism in the Courts," p. 58.

79. *The Economist*, July 11, 1981, p. 41.

80. Corwin, p. 443.

81. Ibid., pp. 445-446.

82. Ibid., p. 80.

83. Ibid., p. 77.

84. Ibid., p. 78.

85. Kaden, "Federalism in the Courts," pp. 47-58.

86. Corwin, p. 79.

87. Ibid., pp. 81-82. See also Kaden, "Federalism in the Courts," p. 51, who points out with regard to the case of *Exxon Corp.* v. *Maryland* that Congress has not legislated on the question of ownership of retail service stations.

88. Corwin, pp. 82-83.

89. Kaden, "Politics, Money and State Sovereignty." The provisions of the act regarding minimum wages and maximum hours were extended to most state and local government employees by amendments in 1974.

90. The court spoke of the necessity to preserve the states' freedom to structure integral operations "in areas of traditional governmental functions."

91. Madden, p. 14.

92. Ibid., p. 16.

93. Ibid., pp. 18-19.

94. Corwin, pp. 447-448.

95. Kaden, "Federalism in the Courts," p. 32.

96. See, for example, *The Economist*, January 17, 1981, pp. 63-64.

97. Madden, pp. 21, 36.

98. Corwin, pp. 79-80.

99. Ibid., p. 75.

100. Ibid., p. 82.

101. *Cigarette bootlegging: A State AND federal responsibility*, Advisory Commission on Intergovernmental Relations, Washington, D.C., May 1977.

102. Corwin, p. 70.

103.. Clifford L. Pannam, "Discrimination on the basis of state residence in Australia and the United States," *Melbourne University Law Review*, 1967-68, pp. 117, 123. Pannam points out that the U.S. provision served as the model for section 117 of the Australian Constitution. The latter is, however, worded somewhat differently.

104. U.S. Supreme Court Reports, 57L Ed 2d, p. 398.

105. Pannam, p. 119.

106. U.S. Supreme Court Reports, 57L Ed 2d, p. 404.

107. Ibid. The quotation is from the court's decision in *Toomer* v. *Witsell* (1948) which is the "Leading modern exposition of the limitations the clause places on a state's power to bias employment opportunities in favour of its own residents."

108. Pannam, pp. 126, 130.

109. Ibid.

110. U.S. Supreme Court Reports, 57L Ed 2d, p. 405.

111. Ibid., pp. 397-410.

112. Ibid., p. 406.

113. Pannam, p. 118.

114. Corwin, pp. 498-499. See also Victoria Heldman, "The right to travel: judicial curiosity or practical tool?" *Journal of Urban Law* 52 (1979): 762.

115. Corwin, p. 259.

116. See Heldman and also Corwin, pp. 257-259, 474, 498.

117. See Heldman.

118. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

119. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974).

120. *King* v. *New Rochelle Municipal Housing Authority*, 314F. Supp. 427 (S:D. N.Y. 1970).

121. Heldman, p. 764.

122. *Sosna* v. *Iowa*, 419 U.S. 393, 406 (1975). Quoted in Corwin, p. 498.

123. Corwin, p. 498 cites two cases, in 1974 and 1975. Heldman cites two cases of the lower courts, both of which suggest that durational residence for city or state employment was struck down. However, in one of the cases cited by Heldman, namely *Fraternal Order of Police, Youngstown Lodge* v. *Hunter* of 1973, an Ohio case, the decision apparently went against the local authorities not because of the right to travel but because the statute sought to violate the contract of persons who became employees prior to the passing of the measure in question. See Corwin, p. 141, and Art. 1, s. 10 para. 1 of the Constitution which contains the "obligation of contracts" clause.

124. These are described by Heldman, pp. 760-762.

125. *The Economist*, July 11, 1981, p. 40.

126. Madden, p. 20.

127. Corwin, p. 258. Since Corwin mentions this case under the heading of Article IV, the decision presumably relates to the privileges and immunities clause of Art. IV, s. 2 rather than to the similar clause in the 14th Amendment.

128. *The Economist*, February 16, 1980.

# SWITZERLAND

## Constitutional provisions and administrative arrangements relating to the free movement of goods, services, people and capital

## SWITZERLAND

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# SOURCES AND ACKNOWLEDGEMENTS

## INTERVIEWS

The most important source for these notes were interviews in Switzerland in June, 1980, with officials, professors and politicians. In particular I should like to thank the following people for generously providing their time and advice:

Dr. Max Frenkel, director of the Foundation for Confederal Collaboration in Solothurn
Dr. Stephan Bieri, senior finance official of the Canton of Aargau, and member of the *commission d'étude*, which is examining the division of tasks between Confederation and cantons
Professor Dr. Luzius Wildhaber, of the University of Basel, formerly director of studies of the Commission of Experts preparing for a total revision of the Constitution
Dr. Paul Nyffeler, president of the government of the Canton of Basel Land.

I should also like to thank Dr. Walter Fetscherin of the Embassy of Switzerland in Ottawa for his invaluable help.

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John A. Hayes
February, 1981

## OUTLINE OF THE FEDERAL SYSTEM

The Swiss federal system has long interested Canadians as a model of how a federation with more than one linguistic group can function harmoniously. In the last few years a number of people in Canada, mainly in Quebec, have suggested that Canada adopt the Swiss system, although their understanding of what composes that system is vague, being confined in most cases to an impression that it is decentralized and works well. This impression is correct. What is not as widely understood is that Swiss decentralization lies less in the division of powers, which, compared with Canada, is more heavily weighted in favour of the federal government, than it does in other characteristics of the Swiss system. These characteristics include notably the processes of direct democracy, which limit the power of government at all levels; the administration of many federal laws by the cantons; and a marked decentralization of power *within* the cantons.

Swiss political culture is unique, but if one were to divide federal systems into groups one would link Switzerland wth the United States. While the U.S. is geographically more than 200 times larger, both countries combine a separation-of-powers political system with a federal structure characterized by a large number of component states each strongly represented by directly-elected senators in the central legislature. Such a system virtually precludes a major role for intergovernmental negotiation, sometimes called in Canada executive federalism. Such negotiation is a prominent, even dominant, characteristic of the Canadian and Australian federal systems, and, in a different way, of the German system.

There are, however, some important differences between the Swiss and U.S. systems. Some of them are as follows:

- In Switzerland, both federal chambers are elected simultaneously for a fixed four-year term. In the United States, members of the House of Representatives are elected for two years and members of the Senate for six, a circumstance which among others gives the U.S. Senate relatively more power than its Swiss counterpart.

- Federal and cantonal elections are not held on the same day, as is the case with federal and state elections in the United States.

- In Switzerland, there is no separate election for president. There is a distrust of concentrating political power in individual leaders. The federal executive is composed of seven members elected by the two chambers in joint session, and the presidency rotates annually among the members. Once elected, the executive is separate from the Federal Assembly (which is the name for the two chambers taken together), so that there is no "responsible government" on the British parliamentary model. In the cantons, members of the executive are elected by the people.

- Legislatures in Switzerland (the federal Senate is an exception) are elected by proportional representation. Due to a Swiss co-operative tradition, the executives at both the federal and cantonal levels are composed in proportion to the party mix in the legislature. Swiss governments are therefore multi-party governments. Party discipline in the legislatures is nevertheless somewhat stronger than in the U.S.

- The separation of powers is blurred slightly, compared with the United States. The method of electing the president is one factor. Also, there is no judicial review of federal legislation. Parliament may legally act beyond its powers in urgent cases provided that, if the action is to continue, it be approved in an amendment to the Constitution. In addition, the legislatures, particularly at the cantonal level, have certain executive functions such as making appointments to various public offices.

- The institutions of direct democracy (plebiscites, etc.), which are a feature of the constitutions of some, notably western, U.S. states, are much used at all levels of government in Switzerland. In Switzerland, there has been and still is as much concern with defining and limiting the role of the state as with dividing this role among the three levels of jurisdiction. Administrative law, which controls the exercise of authority by elected and appointed officials is more prominent. Unlike the U.S. practice, amendment of the federal Constitution is by popular vote.

- As in Germany, much of Swiss federal law is administered by the cantons and communes (municipal governments).

For historical reasons, rather than because of population differences, there are six half-cantons and 20 full cantons. The only important difference between a full canton and a half-canton is that a full canton gets two seats rather than one in the Senate, and it counts for more in the double-majority voting on constitutional amendments.

The Swiss federal Constitution may be amended by a simple majority. It is, however, a double majority: a majority of the people who vote in Switzerland as a whole, and a majority of cantons. This means that the vote is counted separately in each of the cantons to determine whether in a minimum of 12 cantons (two half-cantons being counted as one) there is a majority in favour of the amendment. Australia has a similar requirement for a double majority.

Amendments to the Swiss Constitution are frequent. They generally increase federal power. Since 1848 there has been a trend to extending federal jurisdiction. The Swiss Parliament unquestionably has more jurisdictional power vis-à-vis the constituent states than the Canadian Parliament. Examples are in the fields of civil law (including company law and bankruptcy), social security, labour, agricultural marketing and interprovincial trade generally, land use, highways, vocational training and education. There are federal powers of disallowance, for example, over intercantonal agreements and cantonal laws on establishment (see later), and a declaratory power in relation to national highways.

The Swiss Parliament has more limited taxing powers than its Canadian counterpart. Its grants to the cantons are all conditional or for specific purposes. Most equalization is embodied in such grants. In addition, a proportion of the federal income tax is earmarked for unconditional equalization, shared in by all cantons. Federal subsidies to private health plans are conditional on certain minimum coverage and benefits being maintained across the country.

The municipal level of government is politically strong in Switzerland. In many cantons, it collects the income and wealth taxes for all levels of government and retains an important share of the personal and corporate taxes by virtue of its own taxing powers. Wealth and property taxes are relatively unimportant. There are few direct relations with the central authorities (another difference from the United States).

In terms of capacity to act, however, all levels of government in Switzerland are limited by the processes of direct democracy, including popular votes on tax increases and major expenditures, and by a tradition of minimum intervention. The constitutional earmarking of some tax revenues also limits the discretion of governments and legislatures.

There are three major language groups in Switzerland: German, French and Italian. The French-speaking minority of about 20 per cent is not concentrated in one canton, as are French-speaking Canadians concentrated in the province of Quebec, and the several French-speaking cantons of Suisse Romande do not consider themselves one nation. There are about six families of dialects in German-speaking Switzerland. While the three language groups are geographically concentrated in particular areas, with only a few officially bilingual cantons in between, and one trilingual canton using Romansch, there are cross-cutting cleavages, with the result that opinions on public issues do not typically divide along language lines.

There is no special protection for linguistic minorities. The double majority, which controls constitutional amendments, and the national majority, which is sometimes called upon to approve or reject federal laws in a referendum, could, in theory, be used to serve the advantage of the German majority language group. The real protection for minorities, as in all mature democracies, lies in certain habits and traditions which have developed over the years. Also, there are quite often alliances on public issues between the French-speaking cantons and the smaller German-speaking ones.

The recent creation of the new canton of the Jura (French-speaking) out of the canton of Berne (German majority), approved in a national referendum with a favourable majority in all cantons, must be regarded as a triumph of enlightened politics for the Swiss federal system. However, some leaders of the new canton are continuing to agitate for the transfer to the new canton of counties that, in local referenda, narrowly voted against joining.

# RECENT STUDIES REGARDING A TOTAL REVISION OF THE CONSTITUTION AND A REALLOCATION OF TASKS BETWEEN CONFEDERATION AND CANTONS

In 1965, proposals were made for a total revision of the Constitution. These were only to a minor degree prompted by concern about the intergovernmental division of powers, a concern which has been foremost in Canada, particularly among most provincial governments. Rather, the proposals were prompted by a feeling that Swiss political institutions were becoming outdated. Some people were also concerned about the excessive influence of certain interest groups in the political decision-making process, and the threat to personal freedom posed by governments and other powerful entities. While the Swiss Constitution can be amended fairly easily, it was argued that only a total revision would meet the situation.

There was no popular pressure. However, the executive, the Federal Council, thought it well to ask a small working group to report on whether a total revision was desirable. The Wahlen Group, as it was called, studied the question for five years, between 1967 and 1972, and ended with the controversial conclusion that a revision was desirable.

The second phase of the studies was launched in 1974 with the creation of a large Commission of Experts under the chairmanship of the Federal Councillor for Justice and Police (a member of the federal executive). By this time, the Swiss—who had admired the European Economic Community (EEC) in the sixties—were demonstrating rather more confidence and pride in the decentralized Swiss system, and showing more concern about the erosion of cantonal power. This concern was to grow in the ensuing years, until it was muted by the relative distress of federal finances at the end of the seventies, and the consequent reduced capacity for an extension of the federal role.

The Commission of Experts produced a report in 1977 accompanied by a draft text for a completely new Constitution. The new draft envisaged that on balance there would be a transfer of power from the cantons to the Confederation. Now, as in 1977, the consensus is that a total revision is most unlikely. There are enormous political and practical difficulties. One serious objection is that the proposals leave people with too much uncertainty about what would be the actual effect of the proposed revision. However, another draft text was to be presented by the federal Department of Justice and Police late in 1981.

While the Commission of Experts was doing its work, two other study groups were looking at the division of tasks between the Confederation and cantons, without stressing the constitutional aspects. The motivation was more financial than political: all levels of government were incurring substantial deficits. One group, which began its work in 1973, was set up by the federal Department of Justice and Police. The other was composed of the directors of the cantonal departments of finance. Both groups completed their work in 1977.

In early 1978 the federal Department of Justice and Police established a small *commission d'étude*, composed of federal and cantonal public servants, politicians and professors. The study commission was asked to do the following:

- make concrete proposals regarding a reallocation of tasks, taking into account federal financial prospects
- develop a model structure for the division of tasks
- advise on problems regarding the division of tasks between the Confederation and the cantons.

The study commission submitted its first report on July 31, 1979, which concentrated on the concrete proposals mentioned above. The commission proposed an exchange of certain functions between the Confederation and the cantons, resulting in a small net transfer to the cantons, along with increased financial responsibilities for them. It also proposed increased unconditional equalization to ease the burden on the poorer cantons. This increased equalization would be paid, in effect, by the richer cantons.

The underlying objectives of the commission in making these recommendations were as follows:

- to preserve the autonomy and power of the cantons in the face of the "centralizing tendencies" in the state, the society and the economy
- to disentangle the overlapping responsibilities of the Confederation and cantons. The cantons wanted their functional and financial responsibilities linked, rather than being the recipients of federal conditional grants or administering more federal legislation. The commission stated that some of the smaller federal grants were to be discontinued. The cantons were interested, in principle, in the device of federal framework legislation, but the commission's proposals contained only minor applications of this device. This topic should be tackled in a forthcoming second report.

The proposals, which involve pensions, health insurance, education, housing and other fields, could be implemented largely without constitutional amendment, although some amendments would be required. The commission was subsequently to turn its attention to more difficult areas, such as university education, vocational training, economic structural policy (including agriculture), culture (including the media), energy, and equalization. A major reallocation of tasks between the Confederation and the cantons is not expected, but rather a tidying-up process, with relatively little reliance on constitutional changes.

In the summer of 1980 the Confederation announced a 10 per cent cut in its transfers to the cantons and in nearly all its other grants. Politically, it would have been more difficult to do so, had the Confederation not twice been denied, in popular referenda, the power to impose a value-added tax (VAT). Such a tax would be technically desirable, particularly in view of Switzerland's close commercial relations with the EEC, all of whose members use a VAT, but was opposed by the public because of a desire to curb the growth of government at any level, concern about the additional administrative work it would involve for small businesses, and concern on the part of left-wing groups about the incidence of indirect taxes.

An attempt will be made to establish a new fiscal regime for the Confederation by 1983. As in Canada, there has been a long-run decline in the federal share of final public-sector expenditures, with the municipal share remaining constant and the cantons' share increasing. The cantons now depend on direct, conditional federal transfers for approximately one-quarter of their revenues; for the poorest canton the proportion is nearly one-half.

# THE INTERNAL FREE MOVEMENT OF GOODS, SERVICES, PEOPLE AND CAPITAL

## SUMMARY

The principal interest of Switzerland for Canadians, in the context of free movement, is that it is a well-run federation composed of more than one official language group, and is frequently cited as an example of decentralized government that Canadians should imitate. Federal jurisdiction in Switzerland is relatively wider than in Canada, and this is certainly the case with regard to internal economic mobility. The capacity of the cantons to interfere with free movement is severely limited by a number of factors, and it is much less than that of the Canadian provinces.

Switzerland has a highly integrated economy and there are no serious barriers to the internal free movement of goods, services and capital. Some problems, however, which have become the subject of concern to governments are industrial location incentives and public purchasing preferences. The concern is comparatively recent, dating from the onset of the recession that was associated with the sharp rise in energy prices. With regard to the movement of people, if Swiss citizens are prepared to surmount the linguistic and cultural barriers, there are no government measures that seriously deter them from moving, except for a few groups, such as teachers.

The creation of internal barriers is hindered by the fact that, geographically, Switzerland is a very small country, only one-sixth the size of Germany, and is divided into 26 separate cantonal jurisdictions. A sizeable number of people live in one canton and work in another. An additional factor that inhibits barriers is that Swiss firms usually produce for an international rather than a local market. While Swiss agriculture is protected from foreign competition, Switzerland forms part of an industrial free trade group, which includes the EEC and European Free Trade Association (EFTA) countries. In 1979, half of Switzerland's total exports went to the EEC and two-thirds of its imports came from the EEC.

Aside from these background factors, there are two major influences that promote free movement. The first has greater force in Switzerland than in any of the other federations dealt with: the popular feeling that governments, at any level, should be given no more power (or money) than is absolutely necessary, and that government interference with the working of the economy should likewise be minimized.

The second influence, which gives legal expression to the first, consists of the guarantees contained in the federal Constitution: freedom of trade and industry, which relates to goods, services, people and capital, and freedom of establishment, which relates to the movement of Swiss citizens. Article 60, which requires equal treatment by each canton of all Swiss citizens, is an additional guarantee.

Therefore, both the federal and cantonal authorities, but particularly the latter, have less scope than their counterparts in Canada to introduce measures that deter free movement.

Within the limits imposed by the processes of direct democracy and the constitutional guarantees, the division of jurisdiction with regard to the economy favours the federal government rather than the cantons. Most of the legislation affecting trade and industry is federal. There is no distinction between interstate and intrastate trade.

Article 31 *bis*[1] is one important source of federal authority. It authorizes the Confederation to take measures to promote the general welfare and economic security of its citizens, to favour specific economic sectors or professions, to protect agriculture, and to protect regions where the economy is threatened, but in so doing not to depart from the principle of the freedom of trade and industry except where necessary. Much social legislation is federal too, such as labour and social security. Federal legislation helps integrate the labour market and facilitates freedom of movement. Most civil law is federal.

An important area where the cantons are relatively stronger is in taxation. The cantons are foremost in direct taxation, and there is little harmonization of the income tax laws and rates imposed by the cantons and the communes. The Constitution gives the federation authority to bring this about, but there is insufficient political support, except for technical aspects.

The cantons are more active than the federal government in regional development activity; they administer many federal laws and they have an important police power (safety and morals, etc.). Their police power is the only legislative responsibility they have that is directly related to trade. It is not used in a protectionist way. Some typically police power matters are legislated federally. For example, Article 69 *bis* authorizes legislation on trade in foodstuffs, and on trade in household goods that could endanger health.

## GOODS, SERVICES AND CAPITAL

### Constitutional provisions principally related to economic mobility

The Swiss approach to ensuring free movement is dominated by two important constitutional freedoms: the freedom of trade and industry, which relates to goods, services, people and capital, and the freedom of establishment, which relates to the movement of Swiss citizens.

Freedom of movement is reinforced by the feeling in Switzerland that government intervention in economic matters should be kept to a minimum. (Among the 10 principal countries of Europe, Switzerland has an economy that is the least characterized by public ownership.) Such economic and trade legislation as exists is federal and much social legislation as well (e.g., labour and social security).

The cantons, on the other hand, are foremost in powers of direct taxation, are somewhat more active in regional development activity, administer many federal laws, and have an important police power (safety and morals, etc.). None of these cantonal responsibilities seems to have a significant effect on free movement when one looks at the overall picture.

The principal guarantee of free movement of goods, services and capital is found in Article 31 of the federal Constitution:

> Article 31
>
> (1) Freedom of trade and industry is guaranteed throughout the territory of the Confederation, subject to such limitations as are contained in the federal Constitution and the legislation enacted under its authority.
>
> (2) Cantonal regulations concerning the exercise of trade and industry and the taxes on such activities remain unaffected. However, such regulations shall not depart from the principle of freedom of trade and industry except where the federal Constitution provides otherwise. Cantonal monopolies are likewise excepted.

As is apparent from the text of Article 31, freedom of trade and industry is subject to two sets of limitations. The first—much the more important—is the constraint flowing from such federal legislation as is authorized throughout the Constitution. The second is cantonal regulations and monopolies. They will now be considered separately.

Most of the legislation affecting trade and industry is federal. There is no distinction between interprovincial and intraprovincial trade.

Article 31 *bis* is one important source of federal authority. It authorizes the Confederation to take measures to promote the general welfare and economic security of its citizens, to favour specific economic sectors or professions, to protect agriculture, and to protect the regions whose economy is threatened, but in doing so not to depart from the principle of freedom of trade and industry, except where necessary. (Article 31 *bis* is quoted in full on page 153).

The sole cantonal legislative responsibility directly related to trade derives from the cantons' police power. Even many police power matters are legislated federally, e.g., Article 69 *bis* authorizes legislation on trade in foodstuffs, and on trade in household goods that could endanger health. Federal legislation extends into land use. There is a federal framework law that requires cantons and communes to establish separate zones for manufacturing and agriculture.

The second constraint in Article 31 on the freedom of trade and industry derives from cantonal regulations and monopolies. The cantonal monopolies are of ancient origin and relate to salt, mining, hunting, fisheries and fire insurance. Any new monopolies established by the cantons would not be covered by the exception in Article 31(2).

Some examples of cantonal police regulations sanctioned by judicial interpretation as a legitimate restraint on the freedom of trade and industry are as follows:

- a regulation forbidding the sale of Las Vegas-type slot machines
- a statute restricting prostitution to certain streets of a city
- a regulation requiring certain training for mountain guides, because public safety is involved (but real estate agents or hairdressers may not be so regulated)
- a regulation requiring that installers of certain electrical appliances must live within call of the appliances they install.

There has been a good deal of litigation concerning cantonal power under Article 31. It has been held that cantons cannot limit the number of hairdressers and cinemas, nor the number of taxis, although a commune may limit the number of taxi-*stands* because they use ground controlled by the commune. Cantons can limit the number of restaurants under two special articles.

While regulations under Article 31 are an important area of cantonal jurisdiction, there is little scope for the cantons to use them in a protectionist manner and they do not attempt to do so.

## Goods and services

### • Agriculture

A viable agricultural sector is necessary to Swiss neutrality. The responsibility is mainly federal. Federal gross expenditures are about four times those of the cantons. Article 31 *bis* of the Constitution authorizes federal legislation to depart from the principle of the freedom of trade and industry in order to "maintain a sound peasant population, ensure agricultural productivity and consolidate rural land ownership." Article 23 *bis* requires federal authorities to encourage the cultivation of bread grain and to ensure the existence of a national milling industry.

The federal government spends about eight per cent of its budget in pursuit of these objectives, although one-third is recovered by levies on agricultural imports. The main effort is on maintaining farmers' incomes at an acceptable level. This is accomplished through price guarantees which, as elsewhere, result in surpluses. This takes 60 per cent of federal expenditure, and direct income support payments to farmers account for 20 per cent. The remaining 20 per cent of expenditure goes for structural improvements, an area in which the cantons contribute roughly an equal amount.

All agricultural marketing legislation is federal, although the cantons and the farmers' union help administer it. They also administer the income support payments. Surpluses are exported at subsidized prices, at federal expense. Some cantonal structural activities can and do aggravate surpluses.

There are two remedies open to the federal authority when surpluses become too costly: it can resort to production quotas based on past production levels, as in the case of milk, and it can control construction of new production facilities. New plantings of vines have been controlled for some years. In 1979, legislation was passed requiring that new production facilities for cattle and hogs receive federal approval. Federal agriculture officials note apologetically that this involves "strong interference with the free enterprise system."

### • Government purchasing preferences

Governments in Switzerland are under severe fiscal constraints: tax increases must be approved by a popular referendum at all three levels of government. Major expenditures at the cantonal and local levels are often subject to a referendum. This reduces the scope for paying local suppliers or contractors more than others. However, some cantonal laws do provide for methods of awarding contracts that can favour local businesses, and some cantons by executive discretion will favour them, particularly during a recession. The statutes do not specify fixed percentage preferences. Switzerland is bound by European Free Trade Association commitments as well as General Agreement on Tariffs and Trade commitments regarding the larger contracts.

In 1978, during a downturn in economic activity, the cantonal governments accepted the need for a joint approach and agreed to a non-binding declaration of principles designed to restrict the granting of local preferences. However, it had only limited results. One difficulty is that the communes are, for the most part, beyond the cantons' control in such matters. The communes frequently go against cantonal policy, whether in giving or refusing to give local preferences.

### • Insurance

It is the federal authority that legislates with regard to private insurance firms and supervises their operations (Article 34(2) of the federal Constitution).

### • Pipelines and transmission lines

Article 26 *bis* states that "legislation on pipelines for the transport of liquid or gaseous fuels is a federal concern."

Article 24 *bis* gives the federal authorities important supervisory powers with regard to the exploitation of water power. Section 6 of Article 24 *bis* says that the Confederation may specify limits for the determination by the cantons of charges for the use of water for power. Section 7 says that "energy produced by hydraulic power may be exported only by authorization of the Confederation," and section 9 that "the Confederation is entitled to legislate on the transmission and distribution of electric energy."

### • Standards: health, safety and technical

Under Article 69 *bis* the Confederation is entitled to legislate on trade in foodstuffs, and on trade in other household articles and consumer goods that could endanger life or health. The administration rests with the cantons, under the supervision and with the financial assistance of the Confederation.

Curative medications are controlled by the cantons. In this important and controversial sector, the necessary unity has been achieved by an inter-cantonal agreement to establish common administrative machinery.

Article 40 states that the determination of weights and measures is a federal concern, to be administered by the cantons under federal supervision.

Article 34 *quinquies*, section 3, entitles the Confederation to attach conditions to its housing assistance regarding cantonal building regulations.

- **Transport**

The federal role in transport is relatively larger than in Canada, perhaps because Switzerland is such a small country.

Every business enterprise engaged in public transport, except taxis, requires a federal licence. This requirement even extends to a municipally-run elevator that helps people ascend an escarpment. Trucks have to conform with federal regulations; there are no jurisdictional problems with inter-cantonal versus cantonal trucking.

Article 26 states that "legislation on the construction and operation of railways is a federal concern."

Article 36 *bis* charges the Confederation with the responsibility of setting up a national highways system. The article includes a declaratory power, under section 1. Also, section 2 allows the Confederation to take over from a canton, without its consent, the building and maintenance of national highways "if the interest of the work so requires."

Article 36 *bis* reads in part as follows:

> (1) The Confederation shall ensure the setting up and utilization of a network of national highways by means of legislation. The main communication roads which present an interest for the whole of Switzerland may be declared national highways.
>
> (2) The cantons shall build and maintain the national highways according to the regulations laid down by the Confederation and under its high supervision. The Confederation may take over directly the task incumbent upon a canton on request by the latter or if the interest of the work so requires.
>
> (4) The costs of building national highways shall be shared between the Confederation and the cantons, due account being taken of the charges resting on the various cantons as a result of the national highways as well as of their interests and financial resources.
>
> (6) Subject to the powers of the Confederation, the national highways remain under the sovereignty of the cantons.

A major national highways system is, in large part, completed. The federal share is being financed by levies on motor fuels as required in Article 36 *ter*.

There are provisions ensuring free passage:

Article 37

(1) The Confederation shall exercise high supervision over the roads and bridges in the upkeep of which it is interested.

(2) No duties may be collected for the use of roads the purpose of which is to be open to the public. The Federal Assembly may authorize exceptions in special cases.

Article 37 *bis*

(1) The Confederation is entitled to enact regulations concerning automobiles and bicycles.

(2) The cantons retain the right to limit or prohibit the circulation of automobiles or bicycles. The Confederation may however declare certain roads which are necessary for general transit traffic totally or partially open. The use of the roads for the service of the Confederation remains reserved.

Article 37 *ter* says simply that "legislation on aerial navigation is a federal concern." Swiss Air is a private company but a large part of its stock is owned by governments. Airports are run by the cantons.

## Capital

Switzerland is one of the world's great markets for capital. Add to that the Swiss dislike of government intervention in economic matters, and it is easy to understand why capital flows freely within the country and that this also applies to takeovers of a firm located in one canton by a firm located in another. On occasion, takeovers may cause some resentment, (e.g.,if a firm from German-speaking Switzerland takes over one in French-speaking Switzerland) but the resentment is usually confined to any effect on employment and output. Intervention by a canton or commune would be regarded as an arbitrary action not suitable for a government authority. There are said to be no cantonal personal income tax incentives to encourage investment by individuals in firms located in the canton. Incentives to encourage industry to locate in a canton are described below.

## PEOPLE

### Constitutional provisions related to personal mobility

The right to practise a trade or profession or to carry on a business in any part of Switzerland is protected by Article 31, already described.

Article 45 states that "every Swiss citizen can settle in any place in the country."

Non-Swiss do not have the rights accorded by Article 45 but are subject to legislation passed pursuant to Article 69 *ter*, which reads in part that "the Confederation is entitled to legislate on immigration, emigration, residence and establishment of aliens." Foreign workers without citizenship are relatively numerous in Switzerland. At times they have made up a seventh of the population. The Confederation controls the total inflow, and allocates quotas among the cantons. The cantonal authorities then control the hiring of foreign workers by local businesses within the canton's quota.

Citizenship is a shared area of jurisdiction, covered by Articles 43 and 44. Under 44(2), "federal legislation shall specify the conditions for the acquisition or the loss of Swiss citizenship." The situation is that one is first a citizen of a commune, and then, automatically, of the relevant canton and of Switzerland. A commune can deny its citizenship to those who establish themselves in its territory, whether they be Swiss from other communes or foreigners.

In most cases, there is little advantage for a Swiss to take up new citizenship after moving from one commune to another as it is not necessary in order to vote. If a foreigner cannot find a commune to give him or her citizenship, that person cannot become a Swiss citizen. In any case, it usually takes from 12 to 15 years.

Article 60 assures equal treatment by the cantons of all Swiss citizens: "All Cantons are bound to afford all Swiss citizens the same treatment as their own citizens in the fields of legislation and of judicial proceedings." However, there are special situations in which Article 60 does not apply. For example, only a minority of the cantons have universities, and the Federal Tribunal (the highest court) has ruled that there is no automatic right for university students from outside a canton to get the same treatment as students from inside a canton that has a university. There now is an agreement among cantons to avoid discrimination; it provides for inter-cantonal payments.

## Workers other than those in the professions

There seem to be few problems regarding the mobility of those in ordinary occupations. Most labour law is federal (see especially Articles 34 and 34 *ter*) and most major labour agreements are national, although they can provide for different wage rates according to region. Even federal public servants can get different total remuneration on the grounds that living costs differ from one region to another.

Vocational training—mostly in the form of apprenticeship—is regulated by federal law. A federal department has established regulations for about 270 vocations, prescribing the program and length of training and the form of the final examination. At the end of his or her term an apprentice receives a federal certificate of vocational proficiency, and this is valid throughout Switzerland. The federal law and regulations are administered by the cantons. There are vocational schools run by the cantons, communes and private undertakings. They are subsidized by the federation and by professional organizations.

## The professions

The cantons have less power than do Canadian provinces to regulate entry into and practice of the liberal professions, mainly because of federal authority derived from Article 33(2) and its consequences, such as the effect on university admission standards (see below). Article 33 reads as follows:

> (1) The Cantons may require proofs of capacity from persons who intend to exercise a liberal profession.
>
> (2) Federal legislation shall provide the possibility for such persons to obtain certificates of capacity valid throughout the Confederation.

Article 31 *bis* (see page 153) also applies to the liberal professions and other occupations, and Article 5 of the Transitory Provisions (see page 155) still has some effect as well, mainly for lawyers.

The picture is a mixed one regarding actual freedom of movement. Doctors and other scientific people (not lawyers) have diplomas valid across the country. This includes architects and engineers. A doctor must have a cantonal licence, but if he has a federal certificate there is no difficulty. Federal certificates are valid regardless of language proficiency. Nurses' training is subject to cantonal jurisdiction, but the cantons have delegated their responsibility to the Swiss Red Cross, and nurses receive a Red Cross certificate that is valid anywhere in the country. Teachers receive a cantonal certificate, and a canton is not obliged to recognize another canton's certificate. Lawyers who have been admitted to the bar of one canton must be admitted on request to the bar of any other canton. A notary public fulfils a public function, and the cantons do not have to accept notaries from other cantons.

## Access to social security benefits

Most social security is legislated federally (authorized under such articles as 34 *bis*, *quater* and *novies*) and is administered by the cantons or by private organizations in co-operation with them. There is some joint financing. The cantons, for example, pay a minor part of the cost of the national pension and disability plan. Sickness insurance is financed mostly through private plans, but most of these receive a federal subsidy if they offer certain minimum coverage and benefits. National minimum standards are therefore assured by conditional grants. Hospitals are run by the cantons; the expense is one of their heaviest burdens. Unemployment insurance is legislated federally but administered by the cantons which decide whether an unemployed person is justified in refusing a job.

Administration by the cantons of the various social insurance schemes does in some cases result in different standards being applied, but this does not appear to influence people wishing to move.

For higher income people, private pension plans are more important than the national plan, and where portability is lacking there is an effect on mobility. Federal legislation covering private plans is under consideration with a view to ensuring that they provide an effective supplement for the national plan, with wider coverage and greater portability.

## Political rights of migrants

In general, "the established Swiss citizen shall enjoy at his domicile all the rights of the citizens of that canton and, with these, all the rights of the citizen of that commune" and he acquires the right to vote after three months. Cantonal laws on establishment require the approval of the Federal Council, the executive arm of the federal government (Art. 43). Established persons are subject to the jurisdiction and legislation of their domicile, and federal legislation implements this principle and prevents double taxation (Articles 46 and 47).

### Excluding workers from another canton

A canton's legislation may not, because of Article 60, provide for its own citizens preferential hiring over citizens of other cantons.

### Residency requirement for public servants

Public employees of some cantons and communes are obliged to take up residence in the territory of the jurisdiction in which they are employed. This can apply even to clerical and stenographic staff. During the recent recession several communes and cantons resorted to this controversial measure.

## OTHER POWERS AND POLICIES RELATED TO FREE MOVEMENT

### Competition policy and consumer protection

Competition legislation is entirely federal and derives its authority from Article 31 *bis*. Only harmful cartels are illegal, and the administrative interpretation of "harmful" is such that most cartels are allowed to flourish.

Consumer protection is mostly federal, although there is little legislation so far. An increase in such legislation has become a federal priority. The important exception to federal regulation is the area of medicaments, which is regulated by the cantons.

### Long-term and structural policies

- **Education and vocational training**

Education is essentially a matter for the cantons and communes, but the federal powers are greater than in Canada. These powers include the following:

> Article 27
>
> (1) The Confederation is entitled to set up . . . a federal university and other establishments for higher education or to subsidize such institutions.
>
> (4) The Confederation shall take appropriate measures against cantons which fail to provide for adequate free primary education of a kind which is acceptable to all religious groups.

Article 27 *bis*

(1) Subsidies shall be granted to the cantons in order to help them carry out their obligations in the field of primary instruction.

Article 27 *quater*

(1) The Confederation may grant subsidies to the cantons for their expenses relating to scholarships and other forms of financial aid for education.

(2) The Confederation itself may, in order to complement cantonal regulations, take steps to assist measures in order to further education by means of scholarships or other forms of financial help.

(3) The autonomy of the cantons in the field of education shall always be upheld.

The Confederation obliges the cantons to teach gymnastics and sport three hours a week in primary and secondary schools.[2]

More important than all these powers is the federal power to legislate, under Article 33(2), to enable people to obtain certificates of capacity, valid throughout the Confederation. It has resulted in the establishment of uniform standards for admission to medical schools and the two federal technical universities. This has in turn given the federal government virtual control over the schools' curriculums and over recognition of colleges. In most cases the university entrance certificates given by the cantonal government meet federal regulations. It is only when they do so that they give admission to all faculties of all universities. The fact that vocational training is regulated by federal law has already been noted.

There are no provisions in the Constitution relating to language rights in the field of education. However, there are some minor federal subsidies for minority language teaching.

So far as impediments to free movement are concerned, in Switzerland, as in other federal systems, families that move from one canton to another encounter differences in school curriculums. Schools in different cantons start their school year at different times, some in the spring and some in the fall. In only a few cantons is there more than one language of instruction, but second and other languages are better taught than in Canada.

- **State aids to industry and regional development**

The three levels of government are involved in aid to industry and regional development. Whether the incentives they offer make much difference is a matter of controversy. There are arguments that the effect is not great for the following reasons:

- Twenty-three of the 26 cantonal governments are offering incentives, and they tend to cancel each other out. Also, cantonal governments are not usually aggressive in economic matters, preferring to stay in the background. (In the mountain areas they fit in with the federal conditional grant program and overall policy.)

- This is not a period of rapid expansion in manufacturing industries, but rather one of growth in the service sector, which is usually less amenable to the incentives being offered, and is more influenced by the external economies which attach to particular urban areas.

- Federal activity tends to be concentrated in the rural, mountain cantons and in the watchmaking area in and around the Jura. Its activity, although locally important, is marginal in relation to the location of Swiss industry as a whole.

Nevertheless, there is increasing public discussion about the richer cantons getting into the business of offering incentives, and a committee of cantonal ministers is looking at the question.

There is already agreement among the cantons limiting tax reductions to a period of ten years, but there are exemptions and it is widely acknowledged that the agreement is weak. Such agreements require federal approval, but this is automatic unless the very basis of the federation is threatened, which is usually not the case.

Article 42 *quater* (see page 154) would probably give the federal authorities power to pass a law controlling cantonal tax incentives, but politically it probably would be impossible.

The cantons' industrial incentives include the following:

- tax reductions

- cheap land (very important in Switzerland because industrial land is scarce)

- infrastructure assistance

- financial guarantees (e.g., a guarantee of repayment of a bank or federal loan).

The communes usually work closely with the cantons in these matters; they may also offer tax exemptions (the communes have a share of the corporation income tax) and cheap land.

Federal activity affects regional development indirectly in many ways. Most of the railway system comes under the Swiss Federal Railways. Freight rates are uniform, being strictly related to weight and distance, and therefore not controversial.

Federal programs specifically aimed at regional development are, as mentioned above, most important in the mountain and watch-making areas. The constitutional authority is found in Articles 31 *bis* and 23. There are four laws, the first three relating only to the mountain regions. They provide for the following:

- long-term loans for infrastructure, usually interest free
- loans to promote tourism
- financial guarantees for small and medium-sized enterprises
- assistance for innovation and diversification in areas threatened with economic decline (e.g., the watch-making area).

It is a condition of federal assistance that the cantons have to participate financially, contributing the same amount as the Confederation.

Since 1975, the Confederation has tried to help poorer communes, such as those in the Grisons mountain canton of south-east Switzerland, by offering them interest-free loans to take advantage of federal-canton shared-cost programs. (This probably falls under long-term loans for infrastructure, usually interest free). The federal loans are conditional on the communes forming a regional planning board, composed of 10 to 20 communes. The region can overlap a cantonal border. "The program is designed in part to show that an Alpine regional problem is not always coterminous with a full canton." The cantons must first give their consent, but this is usually a formality. They want to co-operate so as to benefit from the federal conditional grants.

There are about 50 of these regions, half of which have engaged a full or part-time manager, with the Confederation contributing 25,000 francs a year for five years toward the manager's salary.

- **Environmental protection**

It is not the case in Switzerland that weaker environmental controls are a significant factor in determining the location of industry. Settlement is so concentrated that one cannot afford "black" or unhealthy zones.

Federal powers related to the environment are found in several constitutional articles, notably Article 24 *quater*, on the protection of surface and underground waters; Article 24, on the protection of forests; Article 24 *quinquies*, which makes atomic energy a federal concern; Article 24 *sexies*, on nature preserves, historical sites and monuments, and animal and vegetable life; and Article 25, on hunting and fishing. Article 34 permits federal regulations to protect workers against the operation of unhealthy and dangerous industries.

The Confederation has legislated principally on water pollution. But there are important gaps regarding all sources of pollution (air, noise, etc.). A proposed law would fill these gaps and would enable the cantons to act in the absence of federal action, but they would not be able to set different pollution emission standards.

## Commercial infrastructure

- **Banking and financial services**

Article 31 *quater* states that "the Confederation is entitled to legislate on banking," and "such legislation shall take into consideration the specific task and position of the cantonal banks."

The cantonal banks--concerned principally with domestic business—make up the second most important segment of the banking system, the most important being composed of the "big three" banks.

- **Commercial law, company law and securities regulation**

Article 64 (see page 155) entitles the Confederation to legislate in civil law matters, including contracts and bankruptcy. Almost the whole field of civil law is now federal.

Company law is federal. Securities regulation is minimal, but is divided between federal law (*Code des obligations* for new issues) and cantonal law (supervision of the self-regulated stock exchanges).

- **Taxation**

Compared with Canada there is something of a tax "jungle" in the corporate and personal income tax fields. The 26 cantonal governments have widely differing tax systems and tax rates, as do the communes, which, as well as the cantons, levy substantial corporation and personal income taxes. There has been a good deal of talk of the need to harmonize at least the basic elements of taxation law, while permitting the cantons and communes to retain different rates of taxation. A new constitutional provision, Article 42 *quinquies*, was passed in July 1977 to give the federal Parliament the authority to introduce framework legislation for this purpose. Draft legislation has been prepared.

Varying personal income tax rates affect the movement of domicile of high-income and wealthy people. The cantons are not precluded from levying sales taxes, but in fact it is only the Confederation that levies them. Proposals for a value-added tax have twice been defeated by popular referendum.

## INTERGOVERNMENTAL MECHANISMS

Switzerland has a different political system from Canada, and there are 26 cantons compared with only 10 provinces. Federal-cantonal executive relations are not a prominent feature of the Swiss federal system. Consequently, Switzerland is not a promising source of ideas for Canada as regards mechanisms that could promote greater accord in government action, unless it be the federal framework laws and the administration of federal legislation by the cantons, features which are also found in the German federal system.

# WORDING OF RELEVANT CONSTITUTIONAL ARTICLES (other than those reproduced in the text)

## Article 23

(1) The Confederation is entitled in the interest of Switzerland or of an important part thereof, to order public works at its own expense or to encourage such works by granting subsidies.

(2) For this purpose, the Confederation may, against full compensation, make use of the right of expropriation. Further provisions in this regard shall be laid down by federal legislation.

(3) The Federal Assembly may prohibit public works which would affect the military interests of the Confederation.

## Article 31 *bis*

(1) Within the limits of its constitutional powers, the Confederation shall take measures to promote the general welfare and the economic security of its citizens.

(2) While promoting the general interest of the Swiss economy, the Confederation may enact regulations on the exercise of trade and industry and take measures in favour of specific economic sectors or professions. In so doing, it must respect the principle of freedom of trade and industry, subject to the provisions of paragraph 3.

(3) Where this is justified by general interest, the Confederation is entitled to enact regulations departing, if necessary, from the principle of freedom of trade and industry in order to:

  a) preserve important economic sectors or professions whose existence is threatened as well as to promote the professional qualifications of persons exercising an independent activity in those sectors or professions;

  b) maintain a sound peasant population, ensure agricultural productivity and consolidate rural land ownership;

  c) protect regions the economy of which is threatened;

  d) prevent economically or socially harmful effects of cartels and similar groupings;

  e) take precautionary measures in view of times of war.

(4) Regulations under headings a) and b) shall be enacted only if the economic sectors or professions to be protected have taken such measures to help themselves as can reasonably be expected of them.

(5) Federal legislation enacted under paragraph 3, headings a) and b), shall promote the development of organizations based on mutual assistance.

### Article 42 *quater*

The Confederation is entitled to enact regulations, by means of legislation, against arrangements with taxpayers granting unjustified tax advantages.

### Article 42 *quinquies*

(1) The Confederation, in co-operation with the Cantons, shall ensure the harmonization of direct taxes levied by the Confederation, the Cantons and the Communes.

(2) To this end it shall promulgate, by means of Federal legislation, principles for cantonal and communal legislation on tax liability, on objects liable to tax, on taxation periods and on procedural and penal law governing taxation matters and shall supervise compliance. The Cantons shall remain responsible, in particular, for fixing tax scales, tax rates and tax-free amounts.

(3) In legislating on the principles for direct cantonal and communal taxes and in legislating for direct federal taxes, the Confederation shall take account of the efforts of the Cantons to achieve fiscal harmonization. The Cantons shall be granted an adequate period to adjust their fiscal legislation.

(4) The Cantons shall co-operate in the drafting of the federal legislation.

### Article 43

(1) Every citizen of a Canton is a Swiss citizen.

(2) In this capacity, he may take part in all federal elections and votes at his domicile after having duly proved his right to vote.

(3) No one may exercise political rights in more than one Canton.

(4) The established Swiss citizen shall enjoy at his domicile all the rights of the citizens of that Canton and, with these, all the rights of the citizens of that Commune. However, sharing in property belonging in common to local citizens or to corporations and the right to vote in matters exclusively regarding local citizens are excepted unless cantonal legislation should provide otherwise.

(5) In cantonal and communal matters, he shall acquire the right to vote after having been established for three months.

(6) Cantonal laws on establishment and on the right of established citizens to vote in communal matters shall require the approval of the Federal Council.

### Article 46

(1) In matters of civil law, established persons shall, as a rule, be subject to the jurisdiction and legislation of their domicile.

(2) Federal legislation shall enact the provisions required to implement this principle and to prevent double taxation.

## Article 47

A federal law shall specify the difference between establishment and residence and at the same time lay down provisions regarding the political and civil rights of resident Swiss citizens.

## Article 64

(1) The Confederation is entitled to legislate
  on civil capacity,
  on all legal matters affecting commerce and the transactions on movable property. (Law of contracts and tort including commercial law and law of bills of exchange),
  on copyrights in literature and arts,
  on protection of inventions fit for industrial use, including designs and models,
  on suits for debts and bankruptcy.

(2) The Confederation is also entitled to legislate in the other fields of civil law.

(3) The organisation of the courts, procedure and jurisdiction shall remain a matter for the Cantons as before.

## Transitory Provisions
## Article 5

Persons carrying on a liberal profession, who prior to the enactment of the federal legislation provided for in Article 33 have obtained a certificate of capacity from a Canton or from an authority representing several Cantons pursuant to a concordat, shall be entitled to exercise their profession throughout the Confederation.

## NOTES TO TEXT

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1. *Bis* denotes the second principal subdivision of a constitutional article. Under the Swiss system, constitutional articles are subdivided as follows: *bis, ter, quater, quinquies, sexies,* and so on.

2. «Premières propositions en vue d'une nouvelle répartition des tâches entre la Confédération et les cantons»; Rapport de la commission d'étude, Office fédéral de justice, Berne, 1979.

# AUSTRALIA

## Constitutional provisions and administrative arrangements relating to the free movement of goods, services, people and capital

## AUSTRALIA

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# SOURCES AND ACKNOWLEDGEMENTS

The attached notes were written in February, 1981. They are based principally on interviews carried out in Canberra and Sydney in August, 1980, and on various written sources.

## INTERVIEWS

I should like to thank particularly Professor Russell Mathews, director of the Centre for Research on Federal Financial Relations, the Australian National University, Canberra, who arranged for me to be a visiting fellow at the centre for a period of six weeks. Professor Mathews' advice and assistance, and the help provided by the staff of the centre, made my task much easier. Professor Mathews, Professor Ken Wiltshire of the University of Queensland, and Ian MacKay commented on the draft text. Professor Colin Howard, Dean of the University of Melbourne law school, advised on some difficult questions of constitutional law. I am grateful to them all. I should also like to thank others who gave freely of their time. They include:

- Commonwealth Government
  D.J. Abbey, Department of Business and Consumer Affairs
  J. Brassil, Department of the Prime Minister and Cabinet
  F. Bennett, acting head, Department of Industry and Commerce
  D. Charles, Department of the Prime Minister and Cabinet
  J. Hickey, Department of the Prime Minister and Cabinet
  M. Keehn, Department of Business and Consumer Affairs
  T.J. Kelly, Department of Primary Industry
  Dennis Rose, acting head, advising division, Department of the Attorney-General
- Australian National University
  Professor Jeffree Lindell
  Professor Leslie Zines
- Government of New South Wales
  Hugh Roberts, Crown solicitor.

I should like also to thank H.R. Morgan and B.R. Smith, who were with the Canadian High Commission in Canberra, for their invaluable help in arranging interviews with government officials.

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February, 1981

## OUTLINE OF THE FEDERAL SYSTEM

The Australian political and federal system is similar in structure to Canada's. But its functioning is different in some important respects. One major factor is the absence of any equivalent to Canada's French-speaking minority.

An important difference is that the Australian Constitution does not specify matters over which the states have exclusive or reserve powers; they have only residual powers that are left to them after judicial interpretation of the reach of federal (Commonwealth) powers. The latter have been extended considerably by such interpretation, and the trend is expected to continue. Also, the state governments have no formal role in constitutional amendment. The result is that state autonomy does not have nearly as much constitutional protection as does provincial autonomy in Canada.

### PARLIAMENT

Unlike Canada, Australia has a directly-elected Senate. The Senate has not, however, turned out to be primarily a forum in which differing regional interests can be freely discussed and reconciled. It has, instead, become characterized mainly by an extension of the party struggle in the Lower House. The Senate helped to bring about the fall of the Whitlam Labor government in 1975, and, along with the Governor General's handling of the situation, stirred considerable constitutional and political controversy.

The Senate is valuable to the less populous states, because each of the six states has 10 senators, and they exert influence in party caucuses. Tasmania has more senators than MPs.

Members of the House of Representatives are elected by a preferential alternative vote system. The voter lists the candidates in his order of preference, in the same ballot, and the second and third preference votes are allocated among the candidates in the event that none of them has a majority of first-preference votes. The objective is to ensure that the elected candidate represents a majority of the electors.

Elections for the House and for half of the Senate normally take place every three years.

### THE DIVISION OF POWERS

The division of powers between Commonwealth and states is different in detail from the division in Canada, but the overall balance is probably not dissimilar. Many Commonwealth powers are concurrently held by the states, but Commonwealth laws prevail in case of conflict.

In some ways the Commonwealth has more legislative power than Canada's federal government. Section 96 enables it to attach any conditions to grants. The external affairs power has been more generously interpreted than in Canada in the implementation of certain kinds of international agreements. The Australian Citizenship Act is founded upon it, as is Commonwealth control of interstate and intrastate air navigation. The corporations power has a long reach, enabling the central government to regulate almost any activity of trading corporations. The Australian Conciliation and Arbitration Commission in effect sets national wage levels and working conditions. There is a specific power to legislate on social insurance schemes.

The states have less taxing power than Canada's provinces. On the other hand, the states have some legislative powers not held by Canadian provinces, such as the residual power and criminal law. Four of them own their railways (which are a heavy financial burden). Their powers relating to agriculture and the environment are greater than those of Canada's provinces. Also, the Commonwealth lacks certain emergency powers and the declaratory power that are held by the Canadian Parliament. It does not appoint state governors or justices of the state supreme courts. The Whitlam government was unable to legislate a bill of rights: it had hoped to be able to do so through the external affairs power, through the legislative implementation in Australia of the United Nations Charter, but this was ruled *ultra vires*.

There is no charter of rights in the Constitution, although there are a few isolated rights.

The Northern Territory now is completely self-governing, with all the powers of a state, except over aborigines and uranium mining. The Commonwealth Parliament retains responsibility for the Australian Capital Territory (A.C.T.). This allows it to act in state areas of jurisdiction so far as the A.C.T. is concerned. By introducing model legislation it can encourage uniform state laws on particular matters throughout the country.

## CONSTITUTIONAL AMENDMENT

Amendment is by popular vote, on proposals initiated by Parliament. An amendment requires approval by a double majority, that is, by a majority of all Australians voting on the amendment, and a majority in at least four of the six states. Amendments are infrequent; it is difficult to get approval by four states.

## THE POLITICAL DYNAMICS OF AUSTRALIAN FEDERALISM

Professor G. Sawer writes that "the balance of Australian federalism has come to depend heavily on the use of federal financial power to induce State activity in accordance with Commonwealth policy, as against State power to resist or bargain because of the extensive surviving State areas of legislative competence under their residual powers".

The Commonwealth's financial power derives from its monopoly of income, customs and excise taxes; its ability to attach any conditions to its grants; and its dominance of the intergovernmental Loan Council, which controls borrowing by all governments. While the states possess vast natural resources, the Commonwealth gets the lion's share of the revenues, if one includes income tax and the federal oil and gas levy. The states raise a much smaller proportion of their revenue from their own sources than the Canadian provinces; they are relatively more dependent on federal grants.

The Commonwealth's financial power is buttressed by its broadly-based political support, which enables it to use what powers it has to the full and even in a way that would be regarded in Canada as aggressive, such as the use of export and import licensing and foreign ownership regulations to control the development of state natural resources.

## REGIONAL LOYALTY AND POLITICAL PARTIES

While regional loyalties are strong in Australia, there are ideological cleavages that cross regional and state borders, with the result that when Australians divide on various issues it is more likely to be along party than regional lines, compared relatively with Canada. The fact that regional divisions are not as predominant as in Canada means that Australian unity is more secure, as does the sense of Australia's geographical isolation in a dangerous world.

There is more of an ideological gulf between the conservative Liberal-Country coalition and the Labor party than between Canada's main parties. Also the Labor party has at times considered that the powers reserved to the states stood in the way of its political program, and the Whitlam government certainly seemed to want to undermine the states' authority. The following is a quotation from a publisher's description of a recent book on Australian politics. It summarizes the different approaches of the Whitlam and Fraser governments.

> The Whitlam government that came to power in 1972 was committed to health, social security and urban development. What most of these programs had in common was an increased role for the federal government in formulating and implementing social policy. They also involved great increases in government spending for social purposes, with profound consequences for the structures of public finance and for the economy as a whole. . . .
>
> In dramatic contrast to its predecessor, the Fraser government aimed to reduce the role of the public sector in the national economy, to diminish the authority of the central government in the federal system and to scale down the allocation of public resources to social purposes.

The new federalism policy introduced by the Fraser government and designed to reverse the centralizing moves under the Whitlam government has not yet resulted in any major shift in the balance of Commonwealth and state powers. The Commonwealth has been trying to push spending and financing responsibility back on the states. This has resulted in a relative decline in specific purpose grants to the states compared with unconditional grants. On the other hand, the states have been reluctant to take advantage of the Commonwealth's offer not to oppose their levying a personal income tax.

# THE INTERNAL FREE MOVEMENT OF GOODS, SERVICES, PEOPLE AND CAPITAL

## SUMMARY

Australia in many ways is similar to Canada. One of the similarities is that both countries have manufacturing industries that produce goods mainly for a small national market and that are therefore particularly vulnerable to the adverse economic effects of internal barriers and market fragmentation. However, in Australia the existing and potential barriers to free movement are less serious. There are several reasons for this. The main one is that the states have less power constitutionally, financially and politically to interfere with free movement.

The six states have a large area of legislative jurisdiction, but because they have more limited taxing powers than our provinces they tend to be dominated financially by the Commonwealth. While there is no deficiency of federal-state conflict, the authority of Commonwealth government institutions is not as strongly challenged by state government claims to speak for the regions as in Canada. This enables the Commonwealth to use its powers to the full. In the trade area, for example, it uses import and export licensing in an aggressive way to control or influence state activity.

The federal powers over interstate trade and commerce, under section 51(1), have been broadly interpreted to extend "far into intrastate matters," although they do not extend as far as the comparable interstate commerce power of the U.S. Congress, so that a substantial area of intrastate authority remains for the states. That remaining authority has, however, been severely circumscribed by the constitutional guarantee of free trade in section 92, which provides that "trade, commerce, and intercourse among the States . . . shall be absolutely free." The section has recently been described both as the "cornerstone of the common market" and as "an unmitigated pest, a kind of constitutional equivalent of the rabbit and blow-fly rolled into one." The fact is that section 92 has been broadly interpreted to prevent or hinder most government regulation of trade, whether bad, in the sense that it sought to be protectionist on behalf of individual state interests, or good, in the sense that it sought to establish non-discriminatory schemes of a kind that had widespread popular support.

The section has been interpreted to allow only reasonable regulation necessary to an ordered society. Commonwealth legislation seeking to establish a monopoly of banking and air transport has been struck down, on the grounds that the section gives individuals a right to engage in interstate trade. Commonwealth and state complementary legislation, establishing a wheat marketing scheme that involves compulsory acquisition of farmers' wheat, has been upheld, but perhaps only until the next court challenge. State agricultural marketing schemes cannot be made completely watertight because they must not prevent interstate trade. And the states have not been able to regulate or adequately tax interstate truckers who compete with the states' money-losing railways. A variety of state legislation, including a measure designated to control firearms, has run up against section 92.

The Commonwealth has, aside from the monopoly cases and their implications, been less affected by section 92 than the states regarding jurisdiction over interstate trade. Apart from having s. 51(1), it has since 1971 enjoyed a wide judicial interpretation of its corporations power. This gives it wider jurisdiction in that field than the Canadian Parliament has, as does its jurisdiction over industrial disputes that extend beyond the limits of any one state, and its jurisdiction over interstate insurance.

The new joint Commonwealth-state companies and securities regulation scheme is particularly interesting in that it will allow a company to carry on business anywhere in Australia as if it were subject to only one system of company law and administration. A similar pooling of authority is planned to achieve uniform laws relating to food. These new developments help to further the establishment of a true common market in Australia.

The free movement of people is protected by section 92, and to some extent by section 117 which calls for the states not to discriminate against the residents of other states. However, the word "resident" in section 117 has been interpreted narrowly, with the result, for example, that a state law was upheld that excluded lawyers "domiciled" in other states from joining its bar.

There are discriminatory barriers arising from state purchasing preferences for local suppliers; from state marketing arrangements for a few dairy products; and from certain state railway freight concessions. There are distortions arising from state assistance for the location of industry; the Commonwealth has powers to prohibit some types of assistance but chooses not to do so. There are barriers resulting from state jurisdiction in certain fields such as technical standards and agricultural inspection and quarantine, but these are for the most part not used to protect local enterprises.

## GOODS, SERVICES AND CAPITAL

### Constitutional provisions directly related to economic mobility

The most important provisions are section 51(1), which gives the Commonwealth powers over interstate commerce, and section 92, which guarantees interstate freedom of movement. There are, however, some other provisions, as noted below. The full texts of the relevant sections of the Constitution are attached.

- **Commonwealth powers**

Under s. 51(1) the Commonwealth may make laws with respect to "trade and commerce with other countries, and among the States." Section 98 says this power extends to navigation, shipping and state-owned railways.

It is an established rule of interpretation in Australia, deriving from the *Engineers' Case* of 1920, that express grants of power to the Commonwealth should receive the widest reasonable construction consistent with their terms. Section 51(1) has, in fact, been interpreted by the High Court (Australia's equivalent to Canada's Supreme Court) in a way that extends it "far into intrastate matters."[1] For example, it covers the whole of a commercial activity which does not have its intrastate and interstate elements clearly separated. Also, the power has been said in a 1954 dictum to encompass "all matters which may affect beneficially or adversely" the subject-matter which falls directly within the definition of the power itself, and to extend to "the supervision and control of all acts or processes which can be identified as being done or carried out for" the subject matter of the power.[2] Thus, for example, it was held that the power covered an intrastate meat-packing operation that was a preliminary to international trade, and that it also covered labour regulations regarding stevedores.

"Trade and commerce" includes not only the buying and selling of goods, but the transport of goods and passengers, the supply of gas and electricity, radio and television, and banking. Also, the Commonwealth may under s. 51(1) itself engage in trade and commerce. It has, for example, established a shipping line and an airline service.[3] The section does not cover gambling, including a state lottery.[4]

The scope of s. 51(1) has been extended significantly by express and implied incidental powers. The express power is contained in s. 51(39), which gives the Commonwealth jurisdiction over "matters incidental to the execution of any power vested by this Constitution" in Commonwealth institutions and agencies. Under the implied incidental power, which is attached to each of Parliament's main powers, such as taxation, Parliament can do "all things necessary and proper to make effective the purpose in the main grant." So, "Parliament set up the Australian Coastal Shipping Commission to go into inter-State shipping. Here Parliament was relying on its inter-State trade and commerce power, the main grant. Then, under its incidental power, Parliament proceeded to free the Commission from any State taxes."[5]

The Commonwealth's powers over trade, including intrastate trade, have been strengthened by a generous interpretation in the 1971 *Concrete Pipes Case* of the corporations power under section 51(20). The Commonwealth has other relevant powers, such as section 51(14) relating to insurance.

### • Provisions restricting Commonwealth or state powers

The preamble to section 51 and its many subsections which set forth Parliament's concurrent legislative powers contains the phrase "subject to this Constitution." Two sections contain the principal restrictions on the federal trade and commerce power and these are sections 92 and 99. The latter is by far the less important. It restricts only Commonwealth powers, whereas section 92 restricts both Commonwealth and state powers.

### • Section 99, forbidding a preference

There are a few provisions in the Constitution which attempt to prevent the Commonwealth discriminating among states or parts of states. These include, in addition to s. 99, sections 51(2) and 51(3) regarding tax laws and bounties. For their part, the states are prohibited from discriminating under s. 117 against the residents of other states; and state discrimination relating to railway subsidies which passes the test of s. 117 may be forbidden by the Commonwealth under s. 102.[6] Sections 117 and 102 are referred to later in this paper.

Section 99 says "The Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof." According to Professor Colin Howard, the section was inserted because the less populous states feared the Commonwealth Parliament would be dominated by the more populous states of New South Wales and Victoria. In practice, it turned out that the section made it difficult at times for the Commonwealth to assist states in time of need.[7] However, this problem was overcome, partly because section 99 has not been interpreted lately in a way that severely restricts Commonwealth action; and more importantly because while the section limits s. 51(1) and the appropriations power, sections 81 to 83, it does not limit the power to make grants under s. 96.[8]

Cases concerning the trade and commerce aspect of s. 99 have, for example, been about different treatment of ports located in the several states. Not all aspects of s. 99 have been illuminated by judicial interpretation, but two which have are as follows:

- For a trading or commercial preference to fall under s. 99 it must be tangible in practical terms, something more than formal inequality.

- If Commonwealth legislation imposes a uniform rule it will pass the test of s. 99, even though in practice the effects in the different states or parts of states may vary.[9]

### • Section 92, guaranteeing free movement

A far more important restriction on Commonwealth legislation results from s. 92. The section provides that "trade, commerce, and intercourse among the States . . . shall be absolutely free." The wording is vague in that it does not say from what these things shall be free. The "little bit of laymen's language," to use the admiring words of George Reid in the Convention Debates of 1897, has turned out to be the most litigated section in the Constitution.

The section probably was intended originally to do little more than prevent the levying of fiscal charges on interstate trade, or at most to prohibit as well other forms of discrimination against interstate trade. But the High Court, supported by the Privy Council in London when it had appellate jurisdiction, has given the section a broad interpretation. This interpretation accords to individuals a basic right to engage in interstate trade, free from almost any burden, whether or not the burden is discriminatory.

As a result, "interstate trade is in significant measure protected from legislative and executive control by s. 92."[10] Such trade is free from all such control except to the extent that "reasonable regulation . . . is necessary to the continued existence of an ordered society."[11] Such regulation may include, for example, control over interstate movement of diseased plants and animals, and quality controls on food to protect health; there are also some measures which may have an accidental or remote effect on interstate trade which pass the test of s. 92; but on the whole, the section "must be treated as an ever-present threat to attempts to solve economic problems by legislative measures which operate to restrict or control trading or commercial activities."[12] The result is partly good, in that protectionist state legislation is difficult, and partly bad in that some justifiable legislation is precluded, such as protection of wildlife.

Criticism of the High Court's interpretations of section 92 are not universal but they are widespread. Left-wing politicians are not pleased that the court's interpretations prevent either federal or state socialization of business and generally curb government intervention.

For example, at the July, 1978, session of the Australian Constitutional Convention, Commonwealth Senator Evans used graphic language in describing these interpretations. The section has, he said, proved to be quite irresistible to lurk merchants, scramblers, mavericks, and sharp operators of every commercial stripe and colour; and they, "more often than not, have received nothing but encouragement from the High Court. . . . To governments of the right as well as the left, and at both Commonwealth and State levels, section 92 has been an unmitigated pest, a kind of constitutional equivalent of the rabbit and blow-fly rolled into one."[13]

The scramblers and mavericks are those who have arranged their commercial transactions to seek protection under s. 92 against government regulation and taxes.

Before looking deeper into how governments have been handicapped by s. 92, something more should be said about the legal scope of the section in relation to typical commercial transactions, such as production and sale. The paragraphs under the next heading will be of interest mainly to constitutional lawyers, although they do illustrate for the layman the complexity of drafting a section to protect the freedom of interstate trade.

## • The legal scope of section 92

Professor Colin Howard presents in his 1972 book on the Constitution a summary of the general principles of interpretation which had by that date become established under s. 92.[14] The summary is reproduced below, except that Professor Howard's list is in legal terms more precisely stated, and there are two additions to his list. The additions are items 2 and 16, but both are covered elsewhere in his book.

1. The section binds both the Commonwealth and the states.

2. It does not protect transactions between the states and the territories (the Australian Capital Territory and the Northern Territory).

3. Whether the freedom guaranteed by s. 92 has been impaired is a question of fact.

4. In applying s. 92 no distinction is to be drawn between different kinds of interstate commerce.

5. The court will not determine the validity of legislation in relation to s. 92 unless a relevant interstate element arises on the evidence.

6. The section does not apply to matters which are only incidental to trade, commerce and intercourse among the states.[15]

7. The freedom that s. 92 guarantees is from governmental restriction of any kind, whether executive or legislative. (For example, executive discretion to issue a road transport licence to a firm wishing to engage in interstate trade would not pass the test of s. 92). The freedom is not limited to freedom from fiscal impositions alone.

8. The freedom that s. 92 guarantees is freedom of the individual to engage in interstate trade or commerce. (The freedom attaches to the individual rather than, say, to the goods).

9. The freedom that s. 92 guarantees is not limited to literally crossing, or bringing goods across, a border.

10. Whether an admitted burden is an infringement of the freedom of an activity that qualifies as interstate trade or commerce depends on *whether the criterion for bringing the burden into operation is itself an act of trade or commerce*. If the operative criterion is of that character, there is an infringement of section 92. If it is not, there is no infringement, whatever the incidental economic effect on interstate trade or commerce.

11. Reasonable government regulation does not infringe section 92. The High Court has said that "section 92 assumes the existence of an ordered society governed by laws."

12. Prohibition of an activity, whether total or only subject to executive discretion, is not reasonable regulation and does infringe s. 92. (This was true in 1972. However, in the *Clark*

*King Case* of 1978 the court upheld the authority of the Australian Wheat Board to impose a scheme that involves prohibition as "the only practical and reasonable manner of regulation of trade and commerce".)

13. What is relevant is the legal effect of the actual terms of the legislation rather than its purpose or substantive effect.

14. A burden that applies impartially to both interstate and intrastate commerce will nevertheless infringe s. 92.

15. The effect of an admitted burden on the volume of interstate trade is immaterial to the court's decision. Thus, a burden cannot be defended simply on the ground that it has not diminished the volume of trade.

16. Transactions which are antecedent to sale are not covered by s. 92. These include importation and production. Thus, the Commonwealth may restrict imports by duties or licensing, and a state may regulate production, without contravening s. 92. A state may forbid the *mixing* of straw and chaff, regardless of whether the mixture may be destined for interstate trade, because the mixing is a production process, but state laws that act on sale cannot extend to sales made for delivery on either side of the interstate boundary.[16] However, the High Court has taken care to avoid saying that production can never be part of the concept of interstate commerce.[17]

17. The practice of interstate trade does not itself give a person standing to sue. The parties must prove a relevant interstate transaction.

### • The practical effect of section 92 on Commonwealth legislation

Section 92 has been more of a constraint on the states than on the Commonwealth. Until a 1936 decision, s. 92 did not bind the Commonwealth. Since then, the section has resulted in some Commonwealth legislation being struck down. A Commonwealth Labor government after World War II sought to nationalize the banks, but the legislation foundered on s. 92.[18] So also did an attempt to establish a government monopoly of interstate air transport. These two monopoly cases established the "individual right theory" of s. 92, which holds that the section protects the right of individuals to engage in interstate commerce.

It is this right of individuals which is principally in dispute in recent cases concerning the marketing scheme operated by the Australian

Wheat Board. Growers must sell only to the board. The scheme was challenged as being contrary to s. 92 in the *Clark King Case* (1978), but it was upheld by a 3-2 decision, involving only five members of the seven-member High Court, as "the only practical and reasonable manner of regulation of trade and commerce" in the particular circumstances. A second suit was brought against the board by *Uebergang and Others*. The court's decision on that case, handed down in October, 1980, was inconclusive, because some judges felt there was insufficient factual evidence on which to make a ruling, so the *Clark King* decision still stands. However, "an inference which could be drawn from the judges' opinions is that a majority of the court could well invalidate the legislation in the future."[19]

The Commonwealth has on occasion been able to circumvent the restrictions of s. 92. For example, the firm of Ipec-Air Pty. Ltd. wanted to run an interstate air service in the face of Commonwealth policy restricting the field to the existing two airline companies. Ipec-Air took the government to court. Although it was successful in pleading that the government could not, under s. 92, refuse to give it an operating licence, it was unsuccessful in pleading that the section required the government to give it a licence to import the necessary aircraft. So Ipec had a licence to operate an airline but no aircraft.

On the other hand, the Commonwealth cannot impose quotas on interstate trade, and it seems probable that it would not be able to do what the Canadian government did several years ago, which was to restrict the sale of imported oil to that part of Canada that was situated east of a line drawn geographically in the vicinity of Ottawa, the purpose being to establish west of the line a protected market for Canadian oil.

### • The practical effect of section 92 on state legislation

The states have been affected mainly in connection with agricultural marketing schemes and road transport.

Farmers are active and resourceful in challenging state marketing schemes. One company engaged in poultry farming in New South Wales sought to avoid the state's egg-marketing scheme which established quotas on hens kept for the production of eggs. The company set aside a particular batch of hens that produced eggs solely for sale in the neighbouring state of Victoria, claiming that these hens should not fall within the quota. However, the court ruled against the company, on the ground that the production of eggs, and hence the regulation of the number of hens, was an activity antecedent to interstate trade and therefore not protected by s. 92.[20]

The states' difficulties with road transport stem in part from two other problems, which are not shared by Canadian provinces: their lack of access to convenient and productive revenue sources such as income and sales taxes, and the deficits of the railways, which are mostly state-owned. These problems have led them to attempt to restrict the competition which road transport offers the railways. They have, however, been largely unsuccessful, because of section 92, in subjecting interstate road transport to the same kind of regulation as intrastate road transport. The courts have prevented most such regulation on the ground that it burdens interstate trade.

The lengths to which the states have gone in attempting to favour rail over road transport are extraordinary. Tasmanian legislation divided that relatively small state into traffic areas. Victorian legislation has required a certain proportion of commercial transport to go by rail rather than by road. For example, timber producers must ship two-thirds of their timber by rail and obtain a permit for road transport of the rest.

Interstate truckers, whether they be genuine interstate operators or have successfully contrived their operations, by border-hopping, to obtain the protection of s. 92, have been able to evade these regulations. Nor are they subject to state registration fees, third-party insurance charges, stamp duty for vehicle transfers, and licence fees.[21] The courts have held that the only taxes which would not constitute a burden on interstate trade are levies, which must be carefully calculated, to recompense a state for wear and tear of the highways. The states complain that the overall consequences of s. 92 are to prevent them from co-ordinating state transport (i.e., protecting railway revenue), to deprive them of needed revenue, and to give interstate truckers an unfair commercial advantage over intrastate truckers. Professor Howard writes that "interstate commercial conveyance of goods and passengers in this country has been freed from legislative control to an extent which is probably unparalleled in the developed world."[22]

While marketing schemes and road transport have been the principal sources of frustration for state authorities, state legislation has run up against s. 92 in other fields. These include the regulation of local travel agents who operate interstate tours; unfair mail order practices; the trapping of or trafficking in native birds and animals, including kangaroo skins; price controls; and the sale of firearms to private purchasers in another state.[23]

It will be evident that the states' police power has been severely circumscribed by s. 92. They may still, however, regulate production, which is an antecedent to interstate trade, and sales which are not for delivery across the border. Certain controls related to disease and health are also permitted.

States have also been prevented by s. 92 from implementing protectionist legislation. For example, the state of Western Australia sought unsuccessfully to impose a higher licence fee for the sale of wine produced in another state than for the sale of wine produced in Western Australia.

### • The inclusion of the word "intercourse" in section 92

It has been speculated that the word "intercourse" was added to the text of s. 92 because some people thought that the term "commerce" might not embrace activity that was not concerned with profit or pecuniary gain.[24] The term "intercourse" covers not only these non-profit activities but also the interstate movement of people (see later section of this paper).

### • Successive attempts to change section 92

Before judicial interpretation in 1936 extended s. 92 to include action by the Commonwealth, that interpretation was considered already too wide in some quarters. The 1929 "Report of the Royal Commission on the Constitution" contained recommendations which, although not acted upon at the time, were in 1977 quoted with approval by Professor Howard.[25]

The royal commission essentially made three recommendations:

(1) S. 92 should prohibit only (a) fiscal charges, and (b) restrictions imposed by reason only of goods or persons passing interstate.

(2) S. 92 should apply to the territories as well as to the states.

(3) Parliament should be given authority to stop any state from interfering with free trade.

The revised wording of section 92 would have been as follows:[26]

- Trade, commerce, and intercourse among the states or between a state and a territory, whether by means of internal carriage or ocean navigation, shall be absolutely free from any pecuniary impost or from any restriction or liability imposed by reason only of goods or persons passing into a state from another state or territory.

- The Parliament of the Commonwealth may make laws prohibiting, modifying or annulling any law or regulation made by any state, or by any authority constituted by any state, having the effect of derogating from freedom of trade, commerce or intercourse among the states or between any territory or territories and any state or states.

The second paragraph of the above proposal is almost identical to the version of s. 92 that was included in the first draft of the Constitution in 1891.

Professor Howard writes that "these amendments can be equally well applied to current problems without modification. Their basic effect is to considerably restrict the present power of the High Court to decide the scope and effect of s. 92 by means of judicial interpretation."

In 1936, s. 92 was interpreted by the Privy Council to extend to Commonwealth as well as state legislation. The case in question was *James* v. *Commonwealth*, and it concerned Commonwealth attempts to support a South Australian state marketing scheme related to trade in dried fruits. In subsequent years three constitutional amendments relating to s. 92 were submitted to popular vote. The most recent of these was in 1946, and it sought to confer on the Commonwealth the power to make laws in respect of "the organized marketing of primary products." It was narrowly defeated, having gained an overall majority but a majority in only three states.

In 1959, Parliament's joint committee on constitutional review made several recommendations affecting s. 92. Its approach was described in 1978 by Senator Evans as "adding piecemeal corrections to some of (section 92's) worst applications." The committee recommended, for instance, that if three-fifths of the producers of a primary product are in favour of a proposed marketing plan (this was a condition not included in the 1946 referendum proposal), Parliament should be empowered to put it into effect free from the operation of s. 92 but otherwise subject to the Constitution.

The most recent attempt to look at alternatives to s. 92 has been in the Australian constitutional convention which began its sessions in Sydney on September 3, 1973. The convention includes representatives of all three levels of government and of the major political parties. Its most recent plenary session was held at Perth in July, 1978. It has little momentum.

The first session at Sydney referred a number of agenda items to Standing Committee A. The wording of one of these items is interesting in that it indicates the sections of the Constitution that were considered especially important to trade and commerce:

> *Item No. 4*: The legislative powers and immunities with respect to trade and commerce with particular reference to—
>
> (a) the power of the Parliament of the Commonwealth in relation to overseas and interstate trade (s. 51(1));
>
> (b) the power with respect to corporations (s. 51(20));
>
> (c) the power with respect to industrial relations (s. 51(35)); and
>
> (d) the freedom of interstate trade and intercourse (s. 92).

The standing committee appointed a working party which met several times, receiving submissions from governments and others, and which considered Professor Howard's working paper referred to earlier. The standing committee apparently reached no conclusions beyond recommending that the plenary session of the convention at Perth should debate the deficiencies and inadequacies of section 92. This was done, and up to January, 1981, there had been little further progress. No doubt people were waiting for the High Court's judgment of the *Uebergang* v. *Australian Wheat Board* case. The judgment given in October, 1980, was inconclusive.

## • Positions taken at or leading up to the 1978 session of the Australian Constitutional Convention

The Commonwealth government in its April, 1978, submission to Standing Committee A[27] took a relaxed approach to the problems pertaining to s. 92, more relaxed, probably, than would have been taken by a Labor government:

> Section 92 is the cornerstone of the common market that is secured by the Constitution. As such, the Commonwealth believes that whatever problems it may create must be seen in their proper perspective as problems of detail. In general, most of the difficulties that have arisen have been capable of resolution through co-operation between the Commonwealth and the States. Those which have not have involved the implementation of orderly marketing schemes for wheat, dried vine fruits and wine grapes.

A covering letter from the acting prime minister noted that some difficulties had been capable of resolution "by the exercise of other constitutional powers in conjunction with section 51(1)". These other powers no doubt include the corporations power.

The submission noted that the wheat marketing legislation was before the High Court, and without making any recommendation it referred to three possible amendments:

- the amendment proposed in 1959 by the joint parliamentary committee

- the amendment proposed in the 1946 referendum

- an amendment to the effect that in specific cases the Commonwealth could override s. 92 with regulation of a non-discriminatory nature provided there was beforehand unanimous agreement among the Commonwealth and state governments. The submission did not say whether the specific cases were to be confined to agricultural marketing.

The Commonwealth government position was not elaborated upon during the plenary session of the convention in July, 1978.

Three state governments made submissions to Standing Committee A in advance of the plenary session:

> Western Australia The conservative government argued against any amendment, saying that s. 92 is adaptable and that there is "a greater scope for government action than has been realized in the past".[28]
>
> South Australia The Labor government said "it would be preferable to reconstruct the section so as to confine its operation to a prohibition of fiscal burdens . . . or to the prohibition of laws that discriminate against interstate trade or commerce".
>
> Tasmania The Labor government believes "a section 92 type section" is necessary, but the section should clearly state what is forbidden to state governments, rather than describe an activity and leave it "free." The government suggests the following wording, and points out (a) the section would not apply to the Commonwealth Parliament, and Parliament could then, under s. 51(1) and s. 109, override any state law which was inconsistent with proper regulation of any interstate activity; and (b) a state would be precluded from action which *impairs* interstate trade but not from "benevolent discrimination". The suggested wording is identical to that recommended by the late Sir Owen Dixon to the 1929 royal commission: "The States shall not by any discriminatory law or executive act impair the freedom of trade, commerce and intercourse among the States and territories of the Commonwealth."

The working party, commenting on these submissions in its report, noted, with regard to Tasmania's proposal that the Commonwealth be freed of restriction under s. 92, that "some States may not find this aspect of the proposal acceptable" because it would "remove the protection which s. 92 has been held to confer upon individuals from attempted Government monopolisation schemes".

During the plenary session, a delegate from Queensland, named Elliott, representing the Conservative government there, appeared to oppose any amendment of s. 92. A representative of the Conservative government of Victoria said an amendment was "worthwhile and even necessary," and he seemed to prefer confining the operation of the section "only to legislation which discriminates against interstate trade". The representative of the Labor government of New South Wales also supported narrowing the operation of s. 92.[29]

A Commonwealth MP named Wilson expressed concern about the proposals for "watering down" s. 92. He said there is "developing within Australia and within the States a greater usage of what are known as State preferences". For some state government contracts "a 10 or 15 per cent surcharge" is added to the bids of out-of-state suppliers. He continued:

> At a time when we are concerned about Australia's manufacturing industry, and when we recognize that there is a need to restructure that industry, if all States are involved in the process of State preferences we are implying that we would tolerate a situation where there must be six major establishments of every major industry, one for each State. In other words, we deny the main purpose of section 92, which was that there should be a common market within Australia. We find ourselves in a situation where, by a process of economic secession, we destroy one of the fundamental purposes of the federation; that is, to establish within this country a common market.

To sum up the positions taken by governments, all of the Conservative governments except Victoria, that is, the Commonwealth, Western Australia and Queensland, were inclined to leave s. 92 with its existing large scope for preventing government regulation, although the Commonwealth seemed willing to contemplate an amendment regarding agricultural marketing; whereas the Labor governments—South Australia, Tasmania and New South Wales—wanted to narrow substantially the scope of s. 92 but to retain the prohibition against discrimination.

Victoria's departure from the conservative camp on this issue is possibly explained by its geographic exposure to interstate trade. The Victoria representative recited a long litany of difficulties experienced by his government as the result of s. 92.

Most speakers at the plenary session recognized the difficulty of getting approval in a referendum of any constitutional amendment relating to s. 92, because it is a section which is "seen more fundamentally than any other as being philosophically behind the reasons for federation."

### • Professor Howard's working paper

A most useful contribution to the convention's consideration of s. 92 was made by Professor Howard in the working paper of May 10, 1977, which he prepared for Standing Committee A.

Mr. Howard argues strongly that the section should be amended. A change in judicial interpretation would help Australia's legislatures, but that is not the main point. The main point is that as long as the wording remains unaltered, "the course of judicial interpretation remains to a significant degree unpredictable . . . all legislatures are going to remain subject to shifts in judicial opinion and sometimes to almost chance majorities on the court." While the scope of any section is to some extent uncertain, the scope of section 92 "is known to everyone to be wide as well as uncertain," and this "amounts to a significant national problem." He points out that for a period of nearly 40 years until the 1950s the section was the centre of uninterrupted conflict within the High Court.

Senator Evans puts it this way: "Like actors playing Hamlet, each new generation of judges seems to have been overwhelmed by the urge to place its own distinctive stamp upon the section." The divisions in the court continue, as evidenced by the headline of the *Sydney Morning Herald* of October 29, 1980: "High Court in deep split on wheat ruling."

Mr. Howard favours restricting considerably the power of the High Court to decide the scope and effect of s. 92, and removing the economic and political questions affecting interstate trade from the judicial to the political arena. Thus, he would either adopt the recommendations of the 1929 royal commission; or he would drop section 92 altogether, leaving the Commonwealth using s. 51(1) to regulate interstate trade and to prevent discrimination by the states.

### • The alternative ways of amending section 92

The alternatives which have been described above are:

- to leave s. 92 substantially as it is, but to give the Commonwealth power to organize marketing schemes for primary products (presumably agricultural products rather than other natural resources), possibly with the rider that three-fifths of the producers concerned must agree to a particular scheme;

- to restrict the scope of s. 92 by confining the prohibition to fiscal charges and discrimination, possibly exempting Parliament from its application, and possibly giving Parliament a specific power to override undesirable state legislation affecting interstate trade (to the extent that s. 51(1) would not suffice);
- to drop s. 92 from the Constitution altogether, leaving the Commonwealth with more or less unfettered power in relation to interstate trade, and relying upon Commonwealth legislation to oust any undesirable state legislation in that field.

### • The defunct Interstate Commission

Sections 101 to 104 made provision for the establishment and operation of an Interstate Commission, with members appointed for seven years by the Governor General in Council. The commission would have "such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder."

Sections 102 and 104 make it clear that the commission also was to watch over state railway freight rates.

The commission operated for the period 1912 to 1920, but has not been revived. The most recent attempt to re-establish it, in the field of transport only, was made by former prime minister Whitlam. An act was passed but not proclaimed.[30]

### • Section 91 control on state aid to production or exports

Section 91 reads as follows:

> Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

The last part of the section makes state subsidies or other pecuniary aid on production or exports of goods subject to Commonwealth consent.[31] Section 51(3) gives the Commonwealth power to grant such subsidies, provided "they are uniform throughout the Commonwealth."

## Goods and services

### • Agriculture and food

Australia is a major world supplier of agricultural products; about 70 per cent of the value of its production is exported. The Commonwealth has no legislative power specifically relating to agriculture, so it relies typically on its financial resources and on export licensing to legislate and control the quality standards of products that come under the 11 or so export marketing schemes.

The problems presented by s. 92 for agricultural marketing schemes have already been noted.[32] In Australia "it is impossible to produce orderly marketing of any commodity which can be carried across State borders unless there is a high degree of voluntary co-operation, not only between the Commonwealth and the State legislatures affected, but also between the legislatures and persons concerned in the production and marketing of that commodity."[33]

If a marketing scheme requires quotas on production, or regulation of intrastate trade in which corporations are not involved, complementary state legislation is required. If only a floor price is envisaged, Commonwealth legislation is sufficient. Commonwealth legislation can be involved even where production is primarily for the domestic market, simply to provide a co-operative framework for state marketing boards. Examples are eggs and tobacco; both schemes include stabilization. The egg scheme gives rise to a surplus which is disposed of in export markets.

The Australian Wheat Board runs a joint Commonwealth-state scheme for a product which moves into both export and domestic markets in substantial quantities. The main point that has recently been litigated in connection with s. 92 is the compulsory acquisition aspect, that is, the legal requirement for growers to deliver to the board all their wheat except what is needed on the farm where it is grown. Some growers have found it profitable at times to sell their wheat not to the board but to others, and they have for this purpose sought the protection of s. 92 by selling to a buyer across a state border. The issue before the court was, in effect, whether growers could opt out of the marketing scheme if they chose.[34]

There are state marketing schemes for milk which give rise from time to time to interstate "leakages" protected by s. 92. On the other hand, the High Court has held that a state egg marketing authority can require the inspection and grading of eggs imported from another state, on the grounds that such a process amounts to reasonable regulation not inconsistent with s. 92.

State border inspections of agricultural products, including fruit carried by travellers, are not uncommon. They are said to be used to prevent the spread of harmful pests, weeds, and diseases, which can be so disastrous in Australia, rather than for protecting local production. They must pass the "reasonable regulation" test of s. 92. Also, state inspection laws may be annulled by Parliament under s. 112.

The Commonwealth is responsible for the standards of products that are exported, but the states are, in other respects, responsible for the standards of agricultural and food products. There is a mixture of uniformity and diversity. Packaging, such as container sizes, is fairly uniform, but there are different regulations regarding such matters as "date marking."

There are frequently differences between international standards used for export and a state's domestic standards. Also, Commonwealth inspection for export is not always accepted by the states, which have their own inspectors, e.g., for meat. Nevertheless, it is said that differences on the whole are not used to protect local production. The states and the Commonwealth are working on a uniform Food Act which will be similar in purpose to the uniform companies and securities legislation recently put into place (see later section of this paper).

### • Alcoholic liquids

Wine, beer and spirits are not marketed through state government-owned or authorized monopolies. However, s. 113 provides for fermented, distilled or other intoxicating liquids what amounts to an exemption from s. 92, in that the states are able to legislate regarding out-of-state supplies "as if such liquids had been produced in the state".

### • Energy

There are vast energy resources in Australia. The country is 70 per cent self-sufficient in oil, but the percentage has been declining. While the states get most of the royalty income from minerals—about $212 million (Australian) in 1979-80[35]—the Commonwealth gets the lion's share of mineral revenues. In 1979-80 it received about $2,270 million from the oil and gas levy, roughly 10 per cent of Commonwealth revenues. This has no doubt made it easier for the Commonwealth than it would be for a Canadian government to adopt an import pricing parity policy for petrol, diesel oil and liquefied petroleum gas, i.e., a move to world prices.

There is not much interest in nuclear power. The Commonwealth government is encouraging exports of uranium, although the Labor party wants to keep it in the ground. Most of the uranium discovered so far is in the Northern Territory. Uranium mining in the territory is still subject to Commonwealth jurisdiction.

### • Government purchasing preferences

Local preferences are given by state governments, and the margin of preference may amount to as much as 15 per cent. The question has been discussed by industry ministers and at the premiers' conference, which includes the Commonwealth prime minister. The practice is tolerated, but intergovernmental consultation helps to hold down the margin of preference. One example of local preference: governments of states with auto plants buy their cars locally.

Whether such preferences contravene s. 92 is not clear. In 1967, in reply to a question in the House of Representatives, the Commonwealth attorney-general said that s. 92 does not reach down to touch intrastate contracts which give a preference. At that time it was surmised that if there were state legislation, as distinct from executive policy, giving a preference, s. 92 might offer some protection.

### • Insurance

Commonwealth jurisdiction is specified in s. 51(14). Some insurance contracts have not been protected by Section 92 against state regulation, even though premiums were paid across state lines, i.e., the insurance was not held to be interstate trade. However, it is the view of constitutional lawyers that at least some types of insurance could be written in such a way that they would be protected from state regulation under s. 92. Some travel agents are obliged by the states to contribute to compulsory insurance schemes, but it is at least open to argument that the compulsory element may violate s. 92.

Most private insurance companies are supervised by the Commonwealth. The state-run insurance offices are active in all types of insurance, especially fire, accident, motor vehicle and third party liability. No state has a monopoly of automobile insurance. Any attempt to establish one would have to take account of s. 92.

### • Pipelines and transmission lines

Natural gas is shipped from South Australia to Sydney in New South Wales without passing through the State of Victoria. So far as the right of transit is concerned, a state could probably refuse permission for a line to be built; but the Commonwealth could authorize its construction under s. 51(1), the trade and commerce power, and it could expropriate the land. The states, unlike the Commonwealth, are not subject to the requirement that expropriation must be "on just terms."

At one point, South Australia threatened to cut off its supply of gas to New South Wales unless that state cleaned up a badly polluted river, presumably one that ran into South Australia.

### • Resources: state capacity to restrict shipments

There has been concern in Canada about Alberta's ability to restrict production and, as a result, shipments of oil and gas that are destined for outside the province. A few years ago, the premier of Queensland threatened to reduce coal exports to Japan unless Japan increased its imports of Australian beef.

Because of the Commonwealth's power over exports, and s. 92 in relation to interstate trade, the only action that could be taken by a state regarding privately-owned as distinct from state-owned goods would be to restrict production. It could not restrict interstate sales as such. If the Commonwealth wished to compel production and shipments it would probably have to expropriate under s. 51(31). It may expropriate state or private property, provided it does so (a) "on just terms," and (b) for any purpose in respect of which Parliament can make laws.

### • Standards: health, safety and technical

These standards are essentially a state responsibility, but the Commonwealth has legislated, based apparently on its corporations power, with regard to safety and information. These subjects are covered by the Trade Practices Act, sections 62 and 63. Quality standards are left to the states.

Under the Trade Practices Act, mandatory standards can be proclaimed. The states and territories are consulted beforehand. There are eight mandatory standards covering such things as "care labelling" for textile products, and the labelling and packaging of inflammable products. The standards are enforceable only against corporations, but "through the whole of the supply and distribution chain," so that if a corporation is involved at any point in the chain the regulation can be made effective.

State responsibilities nevertheless are extensive. All of them have uniform textile labelling acts. They also administer the approval of pharmaceutical products and foodstuffs. State transport ministers participate along with the Commonwealth minister in the Australian Transport Advisory Council, which sets exhaust emission standards for motor vehicles.

A further evidence of state powers in this field is the fact that Australia is the only major OECD country that has not signed the GATT code on technical barriers. The delay is said to be due to the difficulty in getting the agreement of the states.[36] The Commonwealth could, if it wanted to, use its external affairs power to impose the code on the states, but it has chosen the path of negotiation.

The states have the primary responsibility for public health and for policing products dangerous to health. However, there are Commonwealth-state agreements on most health matters.

While state technical and safety standards may differ, they apparently are not generally used to protect local production. The differences do, however, cause difficulties for business firms active in interstate trade.

Other consumer protection legislation is generally a state responsibility.

### • Transport

Section 98 says the Commonwealth may legislate "with respect to trade and commerce" regarding navigation, shipping and state-owned railways. Section 51(32) gives it the power to control the railways "with respect to transport for the naval and military purposes of the Commonwealth." Four of the states own and operate their railways, some of them still of different gauges, although most inter-capital trunk routes are standard-gauge. The Commonwealth also operates railways and subsidizes national and local roads. A five-year road program of $3.6 billion was announced in mid-1980.

It is probably fair to say that the Australian transport network is not as modern or integrated as Canada's. There are historical and geographical reasons but state jurisdiction over railways is partly responsible.

Railway freight rates in most states are structured so that there is an inducement for all communities in the state, no matter whether they are closer to major transport centres in other states, to ship their goods to centres within the state. This is called tapering the freight rates: the rates are lower for distant communities. The interstate commission mentioned earlier was established in part to counteract this practice; the political difficulties that resulted led to the commission's downfall.

The states subsidize the freight rates of their rural industries, and so add to the financial problems of their railways.

Air transport is an area of mixed jurisdiction. Interstate operations are controlled under s. 51(1), but subject to s. 92. Safety and navigation generally are Commonwealth-controlled under the external affairs power (implementation of an international treaty), and this applies to intrastate air transport as well.

The sea transport link with Tasmania is subsidized by the Commonwealth.

### • Union activity affecting the free movement of goods

Unions are particularly active in Australia. In mid-1980, commercial pilots, who objected to the Commonwealth's introduction of a trivial licence fee for pilots, refused to fly planes in and out of Canberra or any plane in Australia carrying a federal minister. They won a concession. Jurisdictional fights between unions sometimes result in the boycotting of particular suppliers. When the closing of the GM-Holden auto plant in New South Wales was announced, New South Wales workers threatened to encourage the boycotting of auto imports from Victoria. However, such threats tend to be quickly forgotten and action is dropped.

## Capital

It cannot be said flatly that s. 92 protects freedom of capital movements. For example, it is "probable," according to one constitutional lawyer, that a state could require insurance premiums collected in the state (not those from out of state) to be invested within the state. Also, it is quite possible that state legislation excluding or limiting ownership by persons domiciled outside the state of an enterprise incorporated in the state would be upheld, e.g., a provision that limits the purchase of shares across state borders. South Australia passed legislation some time ago to limit outside ownership of the Santos company, which was extracting natural gas. The legislation was not tested in the courts.

The South Australian action is evidence that occasionally there is some local resistance to takeovers by outsiders.

New takeover legislation will be administered by the National Companies and Securities Commission as part of the Commonwealth-state co-operative scheme to regulate the securities industry.[37] The principal motivation behind the legislation, which recently received royal assent, is protection of investors, but it could be that the addition of a further national agency with responsibilities connected with takeovers, particularly one on which the states are represented, will lessen the scope for purely state initiatives.

The Commonwealth under its corporations power could enact a law to prohibit states from intervening to prevent takeovers by out-of-state Australian interests. To override state laws, the Commonwealth law might have to be drafted as a comprehensive companies law and not one directed merely to this particular question. The likelihood of the present Commonwealth government enacting such a law is remote. Takeovers of state companies by foreign interests are subject to the Commonwealth's foreign investment guidelines, so that a state's intervention to prevent a foreign takeover could run afoul of Commonwealth law.

Section 92 would not prevent a state from excluding or controlling the purchase of land by Australian citizens who live outside the state, but section 117 would prevent such legislation if it discriminated on the basis of residence. As noted, however, the use of the word "domicile" could present a loophole so far as s. 117 is concerned.

There are no state income tax incentives for individuals to invest in locally-based firms, because the states do not levy corporate or personal income taxes, but there are tax and other incentives to attract industry.

So far as the public sector is concerned, most capital transactions are co-ordinated by the intergovernmental Australian Loan Council.

## PEOPLE

### Constitutional provisions

The principal relevant sections are 92 and 117. Section 92 provides in part that "intercourse among the States . . . shall be absolutely free." The word "intercourse" applies to the trans-border movement of people and non-commercial exchanges. For example, as a result of s. 92 a state government cannot prevent people entering the state because they have a criminal record. The free movement of people is protected regardless of whether they are engaged in trade and commerce.[38] A young woman who in 1945 travelled interstate to see her fiancé invoked s. 92 successfully against a wartime security regulation that controlled travel.

Section 117 prevents any "disability or discrimination" against a subject of the Queen on the grounds of his or her being resident in another state. The section was designed to prevent "the kind of discrimination which was basically inconsistent with the common citizenship created by the Constitution."[39] It was pointed out in 1927 that the section was designed "to give a unity to Australia for the purposes of commercial and civil intercourse and common citizenship."[40]

The section appears to bind both the Commonwealth and the states. However, the intent of the section has to a large extent been undermined by the High Court's literal interpretation. Thus, if a state law refers to "domicile" it avoids s. 117, because the High Court has drawn a distinction between residence and domicile, the latter being considered to mean the intention to reside permanently.[41] Six months' residence is deemed to be equivalent to domicile, as a working rule. The court's decision related to a state law which required domicile in the state as a condition for lawyers' admission to the bar. The law was upheld, but the decision has been criticized on the grounds that it erodes the protection of s. 117.

Professor Clifford L. Pannam argues that a "much better approach to the interpretation of section 117 would be to ask whether the impugned legislation produces a substantial discrimination against non-residents irrespective of the legal form in which the legislation couches the discriminating factor."[42]

He notes that the wording of the section does not prevent a state from discriminating against subjects resident in the territories. He also points out that while "disability" evidently indicates adverse treatment, "discrimination" does not necessarily do so, in the particular wording of section 117. Consequently, if the section were reworded to reflect its original intention it should take account of domicile, the territories, and—he seems to say—the possibility of a state doing something positive for its residents that it does not do for the out-of-state visitor.

## Mobility trends

"Distances are considerable. People do not move much between states, except that there is some migration towards Western Australia and Queensland." These two states are "looking for new people," and are not inclined to put obstacles in their way.

## Workers other than those in the professions

Labour legislation is largely a state responsibility. The Commonwealth has under s. 51(35) power to conciliate or arbitrate an interstate industrial dispute. It may also legislate where a matter falls under another head such as s. 51(1) which covers, *inter alia*, the area of export or interstate transport. The Conciliation and Arbitration Commission, which has been established pursuant to s. 51(35), "has developed into a major instrument of economic policy which in effect sets wage levels for almost every worker in Australia."[43] The power of arbitration under s. 51(35) extends to employees of state governments and state-run enterprises. The commission has tried with some success to maintain its independence of Commonwealth government policy.

"It is not at all difficult for unions to co-operate in such a way as to extend a dispute arising in one state into at least one other state for the purpose of bringing the problem within the jurisdiction of the Commonwealth authority. It has proved equally simple to bring an issue before the commission by the device of promoting a formal dispute."[44]

The states also have conciliation commissions and industrial tribunals.

There is not much interstate movement of workers, but there appear to be no problems regarding free movement. No state appears to give local workers preference (other than indirectly by favouring local contractors). Skilled tradesmen such as plumbers and electricians must register with state boards, but if a tradesman is registered in one state he will have no difficulty in becoming registered in another. When the GM-Holden plant in New South Wales closed, no difficulty was envisaged from a registration point of view in moving tradesmen from New South Wales to other states.

## The professions

Problems relating to free movement of professionals seem to be fairly minor. States have their own registration boards for professionals such as doctors and dentists, and teachers require certificates, but qualifications are universal, so that if a person has an Australian degree there is no difficulty. There are problems for people from other countries. No examinations appear to be required when people move.

In order for barristers to appear in a state court they have to be a member of the state bar. In at least one state (South Australia) domicile in the state has been required for entry to the bar.

### Access to social services

Most social insurance and social assistance cash payments come from the Commonwealth, so there is no trans-border problem for migrants or visitors. There is state assistance for people waiting for Commonwealth benefits, and payments for special purposes, such as for the wives of prisoners. State public housing policy encourages ownership as well as renting. The program details may have some influence on mobility, but it would be minor.

### Political rights of migrants

States condition the right to vote or hold office on a period of residence within their boundaries. This is consistent with s. 117 because all of the state's residents are subject to the same requirement, and a recently-arrived migrant has not on that account grounds for complaint. In Professor Pannam's view this is unsatisfactory: "the right to vote and hold office is of such a fundamental nature that it should be qualified only by clearly expressed language." [45]

There has been a proposal for joint Commonwealth and state electoral rolls, but some states do not want to participate.

### Excluding workers from another state

One view is that a state could probably duplicate the Quebec law covering the hiring of construction workers without running afoul of s. 92. However, s. 117 would prevent it if the section were construed without making the distinction between residence and domicile.

The Commonwealth controls waterfront labour. At one time, it had legislation under s. 51(1), probably supplemented by the incidental power s. 51(39), which gave a priority in hiring to union members. Some people thought that that priority provision could have violated s. 92.

There seems to be no requirement for state or municipal public servants to reside in the jurisdiction in which they are employed.

## OTHER POWERS AND POLICIES RELATED TO FREE MOVEMENT

### Competition policy and consumer protection

The Commonwealth's Trade Practices Act is the principal legislation. There is state legislation that deals with intrastate aspects of competition policy.

The Trade Practices Act is founded largely on the Commonwealth's corporations power; it covers trading corporations, whether they are engaged in local, interstate or international transactions, and individuals engaged in other than local transactions.

Commonwealth "instrumentalities" (a term that covers Canadian-type Crown corporations but which is wider) are covered by the act, but state government instrumentalities are not subject to it. For example, each state government has an insurance office that writes commercial and other insurance. They are said to engage in practices that would not be permitted under the act. The same applies to the state railways: they are said to compete unfairly with road transport.

The act provides that where an activity is expressly authorized by Commonwealth or state legislation it does not contravene the act. Occasionally, the states will pass legislation to resolve a difficult situation by "bailing out" people in the private sector who would otherwise contravene the act, but this does not happen often. The Commonwealth has power to override such action by the states, but apparently has never done so.

The medical and legal professions are state-regulated. They are not incorporated and usually not subject to the act. Accountants usually are not incorporated; they operate partnerships with unlimited liability. Engineers or architects belonging to an incorporated firm are subject to the act.

The Trade Practices Act covers some aspects of consumer protection, and there is also state consumer legislation.

## Long-term and structural policies

### • Education and vocational training

As in other federations, state education systems tend to be different from one another. The age of entry and the number of years of schooling differ, as does the age at which a child starts to learn certain subjects.

Vocational training is a state responsibility, but there are substantial federal grants.

### • State aids to industry and regional development

The states try to attract industry by providing grants and loans, cheap land, roads, housing, payroll tax rebates (states do not levy income taxes), rail freight concessions, lower prices for electricity, and other incentives. The states generally try to encourage industries to locate away from the major urban centres, in the interests of decentralization.

As already noted in an earlier section of this paper, the Commonwealth has the power under s. 91 to refuse its consent to state fiscal or pecuniary aids to the production or export of goods (certain mining bounties are excepted). Also, if it chose to revive the interstate commission provided for in s. 101, it could under s. 102 forbid "undue and unreasonable" discrimination in railway charges.

The Commonwealth and state governments discuss the problem of interstate competition for industry from time to time. These discussions naturally extend to regional development questions.

Average per capita income disparities among the states are not as wide as in Canada. The Whitlam Labor government expanded Commonwealth activity in regional development, but the present Fraser government clearly wants to leave the field to the states.

### • Environmental protection

Western Australia and Queensland are not known for going out of their way to protect the environment. The Commonwealth has some jurisdiction by virtue of its external affairs power, which includes the power to implement certain international agreements. It was able to intervene to prevent a mining company from excavating sand in a Queensland beauty spot called Fraser Island. Since the minerals extracted from the sand were destined for overseas markets, the Commonwealth was able to deny an export licence, and the mining stopped.

The Commonwealth has no jurisdiction over inland waters because there are none of any consequence for fishing or navigation. It does have some influence on environmental protection through the external affairs power, e.g., Migratory Birds Convention, and in other limited ways.

## Commercial infrastructure

### • Banking

Banking is federal, although there are state banks, e.g., the Rural Bank of New South Wales. The national commercial banks are large and few in number, as in Canada. One of them is owned by the Commonwealth.

The states have their own public insurance corporations which do a lot of business. In Queensland, and possibly in other states, the state insurance office lends money to the state government.

- **Company law and securities regulation**

Constitutional powers in this area are divided between the Commonwealth and the states. The two levels of government have decided to pool their jurisdictional powers in the interests of uniform companies and securities legislation to apply throughout the country. Legislation to set up the Australian Companies and Securities Scheme was introduced in Parliament in 1979.

Three statutes relating to takeovers and securities regulation received royal assent in mid-1980, and the securities regulation aspect of the scheme was to begin in 1981. The National Companies and Securities Commission has been appointed; it is located in Melbourne. A Ministerial Council will from time to time give direction to the commission. The secretariat to the council and some ancillary bodies were to be located in Sydney.

The company law aspects of the scheme were delayed, due to major amendments to the draft legislation, but were expected to take effect towards the end of 1981.

The intergovernmental agreement provides that the administration of company law and the regulation of the securities industry within each state and territory shall, to the maximum extent practicable, be carried out by the entities and personnel of the state and territory administrations, but those entities and personnel will, in the performance of these functions, be subject to the commission's direction.

There may have been some minor changes since August, 1979, in the scheme, but the basic elements have probably remained unchanged. They were at that time described as follows (a reference to a state now probably applies equally to the Northern Territory):

1) A National Companies and Securities Commission will be responsible Australia-wide for both policy and administration with respect to company law and the regulation of the securities industry. "A company should be able to carry on business anywhere in Australia as if it were subject to only one system of company law and administration."

2) A Ministerial Council, composed of the Commonwealth minister and a minister from each of the six states, will give from time to time directions to the National Commission. Most decisions of the council will be taken by simple majority, but a few will require unanimity.

3) The existing state administrations will be continued, but they will be subject to directives from the National Commission.

4) Legislation will be uniform, but the states are not required to surrender or to delegate any constitutional power. Uniform legislation is achieved as follows:

    a) The Commonwealth will enact company and securities legislation in relation to the Australian Capital Territory, substantially similar to the uniform laws at present in force in four of the states.

    b) Each of the states will enact legislation ensuring that the new Commonwealth legislation and any subsequent amendments will have full force and effect in its territory.

    c) Amendments to the Commonwealth legislation will be decided by the Ministerial Council and then placed before the Commonwealth Parliament. If Parliament does not pass an amendment within six months, each state would have the right to take action separately to implement the council's decision.

5) The Commonwealth will pay one-half the cost of the National Commission, and the states the other half on the basis of population. There will be a separate agreement relating to the manner in which company fees collected by one administration on behalf of another are to be shared.

6) The responsible ministers from the Commonwealth and the states will be required to table in their respective legislatures copies of the commission's annual report. This, and the fact that the National Commission and the state administrations will be subject to ombudsman and other administrative legislation, would, it is felt, help to meet the problem of ministerial responsibility that arises under a joint scheme.

7) Because of the urgent need to amend takeover laws, a new takeover code will be legislated by the Commonwealth and implemented by the states in advance of the implementation of the full scheme.

- **Taxation**

Income taxes are levied only by the Commonwealth, and the states have recently reiterated their intention to avoid entering the field, despite the Fraser government's invitation. Both personal and corporation income taxes are therefore likely to remain uniform across the country.

States' taxing powers are limited compared with those of Canadian provinces, especially by s. 90 which prevents them levying any tax that the High Court considers to be an excise tax. As a result of judicial interpretation they have been unable to levy a tax that is related directly to the volume or value of current production or sales. Consequently, there are no general retail sales taxes similar to those levied by nine Canadian provinces. The states are able to levy royalties on minerals because royalties are considered to be payments for rights bestowed rather than taxes. Recently, they have contrived taxes related not to current sales, but to sales in a past period of time. However, these are not yet major sources of revenue. The largest source of state revenues aside from Commonwealth grants is payroll taxes, followed by stamp duties and motor vehicle taxes that vie for second place. Revenue from lotteries and gambling taxes is substantial.

## MECHANISMS

There are some mechanisms in the Constitution, such as s. 51(37), which allow the Commonwealth to legislate on matters referred to it by any state. It has been little used, although two states used it in the 1950s to refer air transport to the Commonwealth. The Constitutional Convention has been examining ways of making it easier to use. Section 91 authorizes the Commonwealth to disallow state fiscal or pecuniary aids for the production or export of goods. Sections 51(33) and (34) allow the Commonwealth to acquire or construct railways with state consent. Section 105A makes Commonwealth-state agreements relating to state debts binding on both parties.

There are also mechanisms established by some statutes. For example:

- the Commonwealth Trade Practices Act provides that where an activity is expressly authorized by Commonwealth or state legislation it does not contravene the act

- the Australian Loan Council co-ordinates government borrowing

- the Australian Companies and Securities Scheme will allow a company to carry on business anywhere in Australia "as if it were subject to only one system of company law and administration"

- there is a proposal for a uniform Commonwealth-state food statute.

# WORDING OF RELEVANT CONSTITUTIONAL SECTIONS

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

    (1) Trade and commerce with other countries, and among the States.

    (2) Taxation; but not so as to discriminate between States or parts of States.

    (3) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth.

. . .

    (10) Fisheries in Australian waters beyond territorial limits.

. . .

    (13) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money.

    (14) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned.

    (15) Weights and measures.

. . .

    (17) Bankruptcy and insolvency.

    (18) Copyrights, patents of inventions and designs, and trade marks.

    (19) Naturalization and aliens.

    (20) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

. . .

    (23) Invalid and old-age pensions.

    (23a) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

. . .

(27) Immigration and emigration.

. . .

(32) The control of railways with respect to transport for the naval and military purposes of the Commonwealth.

. . .

(35) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.

. . .

(37) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

. . .

(39) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

. . .

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs and excise, of offering bounties on the production or export of goods, shall cease to have effect, but any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

. . .

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

103. The members of the Inter-State Commission—

i) shall be appointed by the Governor-General in Council;

ii) shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity;

iii) shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

104. Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

. . .

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

. . .

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to a State.

. . .

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

## NOTES TO TEXT

1. Colin Howard, *Australian Federal Constitutional Law*, 2d ed. (Sydney: The Law Book Company Ltd., 1972), p. 253.

2. Ibid., p. 255.

3. P.H. Lane, *An Introduction to the Australian Constitution*, 2d ed. (Sydney: The Law Book Company Ltd., 1977), pp. 82-83.

4. Howard, *Australian Federal Constitutional Law*, p. 259.

5. Lane, *An Introduction to the Australian Constitution*, pp. 119-120.

6. For an in depth examination of these provisions, including s. 99, see Denis Rose, "Discrimination, Uniformity and Preference—Some aspects of the express constitutional provisions," in *Commentaries on the Australian Constitution*, edited by Leslie Zines (Sydney: Buttersworth, 1977).

7. Colin Howard, *Australia's Constitution* (Harmondsworth, England and New York, N.Y.: Penguin Books, 1978), pp. 48-49.

8. R. Else-Mitchell, "Constitutional Review in the Australian Federation," in *Federalism in Australia and the Federal Republic of Germany*, edited by R.L. Mathews (Canberra: Australian National University, 1980), p. 162. He describes s. 96 as "a most necessary safety valve by which the Commonwealth can avoid the impact of the prohibitions against discrimination and preference contained in the taxation provisions of the Constitution."

9. Howard, *Australian Federal Constitutional Law*, pp. 358-365. See Rose, "Discrimination, Uniformity, and Preference," for a more detailed discussion.

10. Howard, *Australian Federal Constitutional Law*, pp. 259 and 262.

11. Ibid.

12. Else-Mitchell, *Constitutional Review*, p. 162.

13. Proceedings of the Australian Constitutional Convention, 1978, pp. 64-65.

14. Howard, *Australian Federal Constitutional Law*, p. 286.

15. Commonwealth powers, such as s. 51(1), do include incidental matters, as noted earlier.

16. *Howard, Australian Federal Constitutional Law*, p. 278.

17. P.E. Nygh, "An analysis of judicial approaches to the interpretation of the commerce clause in Australia and the United States," *Sydney Law Review*, 1965-67, p. 364. Professor Nygh refers to the *Grannall* case of 1955, although he acknowledges that the court came nearer to saying it in the *Beal* case of 1966. He points out (on p. 362) the

difficulties that can arise. For example, the U.S. Supreme Court "pretended to divide into production and transportation the instantaneous process of the generation and transmission of electricity."

18. It will be recalled that Parliament's legislative powers in s. 51, which include banking, are overridden by s. 92.

19. *Sydney Morning Herald*, October 29, 1980.

20. *Bartters Farms Pty. Ltd.* v. *Todd* (1978). A brief description of the case appears in *Australian Federalism*, 1978 ed., published annually by the Centre for Research on Federal Financial Relations, Australian National University, Canberra.

21. Statement of representatives from Queensland and Victoria. Proceedings of the Australian Constitutional Convention, 1978, pp. 65 and 68.

22. Colin Howard, "Working Paper on Section 92 of the Constitution," for Standing Committee A, Australian Constitutional Convention, published in the Committee's *Second Report of Standing Committee A to the Executive Committee*, April 21, 1978 (Melbourne: Government Printer, 1978), p. 30.

23. A useful review of recent court decisions is contained each year in *Australian Federalism*.

24. Howard, *Australian Federal Constitutional Law*, p. 357. See also Nygh, "An analysis of judicial approaches." p. 372, who says that in Australia, unlike in the United States, the term "commerce" does not include "intercourse."

25. Howard, "Working Paper," pp. 32-33. See also *Report of the Royal Commission on the Constitution* (Melbourne: Government Printer, 1929), especially Chapter XIV.

26. The redundant introductory words are here omitted.

27. Australian Constitutional Convention, *Second Report of Standing Committee A to the Executive Committee*, April 21, 1978 (Melbourne: Government Printer, 1978).

28. The submission referred in this connection to an article by G. Caine, "Regulation: the key to control of interstate trade?" *Australian Law Journal*, 1976.

29. For the discussion at the plenary session see *Proceedings of the Australian Constitutional Convention*, Perth, 1978.

30. Howard, *Australia's Constitution*, pp. 49-52 and Lane, *An Introduction to the Australian Constitution*, p. 143.

31. Section 91 refers only to fiscal or pecuniary aid. See *Australian Federalism*, 1978, p. 32, which reports the case of *Seamen's Union of Australia* v. *Utah Development Co.* (1979).

32. See earlier section of this paper entitled "Constitutional provisions directly related to economic mobility."

33. Howard, "Working Paper," 1977, p. 30.

34. See earlier section of this paper entitled "Constitutional provisions directly related to economic mobility."

35. The states are prohibited from levying an excise tax based on the volume of the commodity currently extracted or sold, but mineral royalties and land rentals are considered to be payments for rights bestowed rather than taxes.

36. The information was correct as of August, 1980.

37. The other national agencies are the Foreign Investment Review Agency and the Trade Practices Commission.

38. Howard, *Australian Federal Constitutional Law*, p. 358.

39. Clifford L. Pannam, "Discrimination on the basis of state residence in Australia and the United States," *Melbourne University Law Review*, 1967-68, p. 106.

40. Ibid, p. 143.

41. There are other relevant factors in distinguishing between residence and domicile. See Pannam, "Discrimination," pp. 131-149.

42. Ibid., p. 135.

43. Howard, *Australia's Constitution*, 1978.

44. Ibid.

45. Pannam, "Discrimination", p. 148.

# FEDERAL REPUBLIC OF GERMANY

**Constitutional provisions and administrative arrangements relating to the free movement of goods, services, people and capital**

## FEDERAL REPUBLIC OF GERMANY

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# SOURCES AND ACKNOWLEDGEMENTS

## INTERVIEWS

The most important source for this section were interviews carried out in Germany in June, 1980. Many officials, professors and others generously contributed their time. They include:

Professor Dr. Ulrich Scheuner, Bonn
Professor Dr. Gerhard Lehmbruch, Dean of Social Sciences, University of Konstanz
Dr. Karl Christian Zahn, of the Bonn office of the Land (provincial) government of Baden-Wurttemburg
Dr. G. Konow and Dr. Rolf Kaiser of the Federal Chancellor's Office, Bonn
Holger Grauel, of the Federation of German Industry, Cologne
Dr. W. Schreckenberger, head of the Staatskanzlei of the government of Rhineland-Pfalz, Mainz, and member of the former Federal Commission on Constitutional Reform (Enquête-Kommission Verfassungsreform)
Dr. Goeke of the Economics Ministry, Land of North-Rhine Westphalia, Duesseldorf
Dr. Robert Held of the Frankfurter Allgemeine Zeitung
Dr. Horst A. Vogel, director of the Institute for Finance and Taxes, Bonn
Dr. Rainer Schmidt-Ott of the Federal Economics Ministry, Bonn
Dr. Ziller, director of the staff of the Bundesrat, Bonn.

I should also like to thank the staff of the Canadian Embassy, Bonn, and Frau Dr. Kloehne of Internationes, federal government, for helping to arrange most of the interviews.

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*Facts About Germany*. Edition for the Press and Information Office, Government of the Federal Republic of Germany, 1979.

John A. Hayes
February, 1981

## OUTLINE OF THE FEDERAL SYSTEM

The German federal system is unlike any other. Most legislative power is concentrated at the centre, but the provinces administer not only their own legislation but much federal legislation as well. This division of labour, or specialization of the two levels, helps to prevent duplication of effort, but it also requires institutionalized co-ordination. The most important vehicle for this co-ordination is the Bundesrat, which although it is not, strictly speaking, the second chamber of the federal Parliament, in some important respects plays that role. It is composed of provincial government delegations who vote on the instructions of their respective governments.

As in Canada, there are 10 provinces. They are called Land (singular) or Laender (plural). There is also Berlin, which is not governed by the federation, but has a special status with only restricted voting rights in the two houses of Parliament. The popularly-elected federal chamber is called the Bundestag.

### THE DIVISION OF POWERS

The Constitution of 1949 contains, in Article 73, a short list of exclusive federal powers and, in Article 74, a long list of concurrent powers. Article 71 allows the federation to delegate legislative authority in its exclusive field to the provinces. When the federation legislates in a concurrent field, which it can do when the rather loose criteria of Article 72 are met, its laws prevail over provincial laws.

The federation has, in fact, pre-empted most of the large concurrent field of legislation. The result is that the provinces now legislate mainly in regard to education, law and order, municipal organization, and cultural matters such as broadcasting. Several of these matters are shared with the federation. The federation participates in educational planning and in the capital cost of university facilities. It has jurisdiction in foreign aspects of cultural policy as well as in a few domestic aspects. It has exclusive jurisdiction in certain security and police matters. There have been about 34 constitutional amendments since 1949; none has given additional powers to the provinces. Germany's membership in the European Economic Community (EEC) has, if anything, weakened the role of the provinces vis-à-vis the federal authorities.

### THE PREFERENCE FOR UNIFORMITY

Because most legislation is federal, notably in tax, economic, labour, social policy and civil law matters, much of the focus of national politics is on Bonn, and there is a good deal of uniformity in public policies and programs. People generally want uniformity and equal opportunity for all. "Uniformity of living standards in the federal territory" is twice mentioned in the Constitution: first as a criterion for federal legislation in concurrent areas of jurisdiction, and second as a consideration in the federal-provincial sharing of tax revenues. Most of the major taxes in Germany are levied under federal legislation at uniform rates and the proceeds shared between governments. It would be "intolerable" to have income tax and sales tax rates differ between provinces.

Per capita income differences from one region to another are not as wide as in Canada. This is a result of the provincial distribution of economic activity, the income redistribution brought about by the largely uniform tax system and to a lesser extent by the common agricultural policy of the EEC, and the absence of provincially-owned natural resources of a kind that markedly affect the distribution of provincial wealth. Some part is also due to a tendency to assert regional self-sufficiency. In other words, each region tries to make the best use, in a spirit of healthy competition, of the comparatively equal opportunities it is given. It parallels the self-reliant qualities of the German people.

## FEATURES THAT ASSURE THE PROVINCES A MAJOR ROLE

Although provincial authorities are largely concerned with administration rather than legislation and policy, there are various features of the system that assure them a large measure of political consequence.

- Federal laws that affect the provinces require the consent of the Bundesrat. Also, a provincial government can immediately appeal to the Constitutional Court if it believes a federal law is unconstitutional, whether or not the law impinges on provincial jurisdiction. Half of the court's members are elected by the Bundesrat and half by the Bundestag.

- The Constitution guarantees the provinces an equal share with the federation of the proceeds of the income taxes, after the municipalities' share has been deducted, and a share of the value-added tax. This provision alone helps to preserve a certain political balance between the federal and provincial levels. The provinces, as a group, finance most of their expenditures through their own taxing and borrowing. Federal transfers to the provinces are relatively small, compared with other federations. Even smaller is equalization, which is mostly accomplished by inter-provincial transfers.[1]

- Constitutional amendments require two-thirds of the votes of the Bundesrat as well as the vote of two-thirds of the members of the Bundestag.

- The responsibility for administering most laws entails the control and direction of large and sophisticated bureaucracies. The provinces and municipalities together employ about 2,500,000 public servants; the federation employs about 300,000.[2] The responsibility also, at times, carries important discretionary powers: while the law on nuclear power is federal (with Bundesrat consent required), the decision on whether to license the construction of a particular nuclear plant is taken by the provincial authorities.[3]

## RESPONSIBLE PARLIAMENTARY GOVERNMENT

Germany has a parliamentary system of responsible government, but there are some differences from the Canadian system.

- The term of Parliament is normally a fixed one of four years. (This is also true of most provincial legislatures).

- The Chancellor is alone responsible to the Bundestag (not his ministers), and he may not normally be removed from office unless the House votes in a successor.

- Deputies of the minority parties are given special weapons to control the government: one-quarter of the members of the Bundestag are sufficient to establish a committee of investigation.

- Deputies are elected by a modified form of proportional representation: half are elected on a constituency basis on the "first-past-the-post" principle and half from a party list in proportion to the popular vote. To promote political stability, there is a mechanism to limit the number of parties represented: only parties that receive at least five per cent of the total popular vote or win three constituency seats are allowed to share in the distribution of the party-list seats. Parties which, *inter alia*, "endanger the existence of the Federal Republic" are unconstitutional.

- The consent of the Bundesrat is required for half or more of federal legislation, but not for the federal budget. "Serious difficulties can arise for the Federal Government if it does not have a safe majority in the Bundesrat."[4]

## THE BUNDESRAT AND THE INTEGRATION OF FEDERAL AND PROVINCIAL POLITICS

The Bundesrat since 1969 has been controlled by the conservative (national CDU and Bavarian CSU) parties who are in opposition to the Bonn government (a coalition of the moderately socialist SPD and the liberal FDP). On *most* of the *major* controversial legislation, the Bundesrat divides on party lines, but the result of this is that government legislation tends to be changed substantially rather than rejected outright. Even on the division of revenues between the two levels of government a partisan element is sometimes present as it was during the discussions in the summer of 1980 regarding the division of the proceeds of the value-added tax.

The underlying reason is that the political cleavages in Germany tend to be based on class and ideology rather than on regional differences. Political and intellectual energies, that in Canada are used to emphasize or invent differences between provinces and language groups, are, in Germany, channelled into controversy about such things as how best financially to assist families with children, a subject which has recently given rise to keen differences between the political parties.

Federal and provincial (and even municipal) parties and politics tend to be integrated.[5] Bavaria is the exception that proves the rule, and it is only partly an exception. In most provincial elections national issues are prominent and often dominant. For the federal government, provincial elections are like major by-elections in providing a barometer reading of public support.

In the last few years, it could have happened on two occasions that the result of a provincial election would have given the Bundesrat opposition a two-thirds majority in that chamber. Because of a particular provision in the Constitution, that could have resulted in a change of government in the Bundestag. But in each case the government party won the provincial election and a possible crisis was averted.

The integration of federal and provincial politics helps to bind the country together, because political alliances are formed that cross provincial and regional boundaries. There are many evidences of this integration, three of which are noted here.

- Politicians typically move up to federal politics from municipal and provincial politics. This happens only occasionally in Canada.

- During preparations for the regular first ministers' meetings, representatives of the governments affiliated with the two main party groups meet separately to decide what agenda items they should push.

- The president of the republic is elected by an alliance of federal and provincial deputies of the same party grouping. The electoral college, which chooses him, is composed of all federal deputies and an equal number of provincial deputies chosen on the basis of proportional representation.[6] When the present president was elected in 1979, it so happened that the CDU-CSU had a majority in the college, even though they were not the governing party in Bonn, because their representation at the provincial level substantially exceeded that of the SPD-FDP. As a result, a CDU politician, Karl Carstens, became president.

## IS THE FEDERAL REPUBLIC A REAL FEDERATION?

Some observers in Germany doubt that the federal republic is really a federation at all because of the degree of integration of federal and provincial politics, which is unparalleled in the other western industrialized federations, even in Australia; the degree of uniformity in public programs; and the homogeneity of the population (Bavaria aside, France is more regionally varied than Germany).

There are other integrating factors as well. For example, television, despite Land jurisdiction, is seen as a centralizing influence: there are no private stations, only limited regional variation in programming, and no time zones. Television "creates a big hall where you can assemble the whole nation together", in one language. However, federalism is preferred and survives in Germany. This is partly because of its historical roots, but partly also because it is believed to provide firstly, some insurance against a return to the monopoly and abuse of power by a totalitarian regime, and secondly—in its particular German form—a useful structure of administrative decentralization.[7]

German politics is characterized, more than Canadian (but not as much as Swiss) politics, by a search for consensus. This is due partly to institutional factors: the role of the electoral system, with its element of proportional representation, and, at the federal level, the role of the Bundesrat. Political party groupings are not polarized as in France and

Italy. Controversial and divisive leadership stances, such as those taken by governments in some countries and provinces with "first-past-the-post" systems, and often with the support of only a minority of the electorate, are not as common.[8]

There are other institutional factors which impose a restriction on the freedom of action and initiative of governments at both levels:

- There is the surrender of some sovereignty to the common institutions and arrangements of the EEC, such as the Common Agricultural Policy, the European Monetary System, and the free movement of goods and people.

- The Constitution contains a number of basic rights that must be respected by both levels of government.

- At the provincial level, there is little scope for political initiatives based on new legislation because most legislative jurisdiction lies with Bonn, including jurisdiction over the major taxes. In Bonn there is more scope, but not as much as in Ottawa, because of the substantial part of legislation requiring the Bundesrat's consent. This part includes the tax laws and rates. It is not usual for tax rates to be adjusted frequently, and clearly it is more difficult for a government in Bonn to time tax reductions to suit its partisan purposes. At both levels, a government's borrowings may not exceed the investment share of spending, although there are some loopholes in the definition of investment.

- The fact that the term of Parliament and of the provincial legislatures is normally fixed is a further constraint on governments. Legislatures cannot be dissolved at will, to suit the purposes of the governing party or coalition.

It was noted above that at the provincial level there is little scope for legislative initiatives. Even when some scope exists, provincial governments do not always use it. They sometimes prefer collective action or responsibility, and this is reflected in those federal framework laws which actually, as the result of provincial preferences, ensure uniformity rather than variety. Something of this spirit also underlies continued support for the Joint Tasks mechanism whereby the federal and provincial governments jointly decide on the allocation of certain federal grants: an individual government can avoid pressures by pointing to a collective decision-making procedure.

Some observers think there is too much harmonization in Germany, at least among the provinces. The fact is that the provincial authorities accord a good deal of importance to the popular wish for uniformity of treatment across provincial boundaries. In a few areas of responsibility, however, there are differences, such as in the preference of the SPD Laender for the so-called comprehensive schools and relatively easy abortion, and the preference of the CDU-CSU Laender for traditional schools and tougher abortion laws.

## THE ROLE OF THE COURTS

The courts play a major role, partly because there are a number of basic rights in the Constitution, and partly because there is an:

> enduring preoccupation with . . . legally-binding norms in all those areas of activity in which public authorities are exercising powers in relation to the citizen and interact one with another . . . .Overall German administration works within a legal framework which imposes far more controls on matters of procedure and substance than does the British legal system.[9]

Federal-provincial disputes are more likely than in Canada to be resolved by reference to the Constitution and the courts than by political negotiation. Even though co-operation cannot really be compelled, the Constitutional Court has developed the principle of *Bundestreue* (faithfulness to the federation). It is a principle which can impose constitutional obligations on governments in some circumstances.

## INTERGOVERNMENTAL RELATIONS

Federal-provincial relations are largely institutionalized, whether in the Bundesrat or in other continuing councils and committees. These relations tend to be more pervaded by party political allegiances than in Canada.[10] As in Canada, these relations are sometimes successful and sometimes not. The *Finanzplanungsrat*, for instance, has not been noticeably successful in co-ordinating fiscal policies.[11] Also, as in Canada, they are sometimes decorous and sometimes not. In the 1980 battle over the division of the proceeds of the value-added tax some extraordinary, impolite language was used. There is also keen controversy about the distribution among the provinces of federal grants. However, controversy about the distribution of industrial activity among them is not a serious problem, as it is in Canada.

# THE INTERNAL FREE MOVEMENT OF GOODS, SERVICES, PEOPLE AND CAPITAL

## SUMMARY

The problems in the way of free movement in Germany are less intractable, and the constitutional weapons to preserve it more powerful, than in Canada. If someone hears of barriers to free movement then he usually feels it must be something to do with the EEC, not with the internal market.

The problems are less intractable because of Germany's smaller size; the consolidation over a period of more than a century of a tradition of free movement; and increasing political integration which, since World War II and the population movements that helped break down regional frontiers, has made discrimination among provinces anathema. The fact that Germany produces most of its goods for a European or world market rather than solely for regional or national consumption is also relevant.

In Germany in 1871, as in Switzerland in 1848 when the Swiss confederacy became a federation, there was a strong notion that economic unity must not only be preserved but strengthened. The most important motive for German unification at that time was economic; Austria was excluded, because its economic interests were different from those of the Prussians. The Prussian government and the liberal majority in the German Parliament wanted economic integration. The issue of free movement in Germany was therefore resolved a century ago, so far as the private sector was concerned.

The Basic Law of 1949 (the present Constitution) provides powerful tools to protect economic mobility. While it does not rule out socialization, there is a bias in favour of a free market economy. There are individual basic rights to freedom of movement and the choice of an occupation. Subject to these basic rights, the federation is given exclusive power over freedom of movement of all kinds, and over the unity of the customs and commercial territory.

These federal powers, which deal explicitly with mobility, have been reinforced by the fact that most economic and social legislation is federal, thus reducing the scope for the provinces to legislate barriers that might affect mobility indirectly. Three of the four major taxes are uniform across the country, as to both laws and rates. There is no distinction between jurisdiction over interstate and intrastate trade: the jurisdiction is all federal.

The provinces have responsibility for the administration of many federal laws, but in the economic field administration is often of little import, given the existence of a largely free economy. Besides, it is said that except in the case of *Strukturpolitik* (industrial and regional development), the provincial bureaucrats are centralists in economic matters.

German membership in the EEC has strengthened the country's commitment to free movement within its borders. It would now be virtually impossible to devolve important economic powers on the provinces. Devolution in Italy and Spain has apparently not included any major economic powers, and this may illustrate the difficulty of doing so in countries that are EEC member states or which aspire to be.

EEC initiatives impinge increasingly on mobility-related legislation in member states to a degree that extends to schools, cultural matters and police. The provincial authorities have little to do with this process. Although they have a joint representative in Brussels, he is not a member of the German delegation to the EEC. Also, the provinces have taken the position that German contributions to the EEC budget are purely a problem for the federation.

The preservation of free movement within the federal republic is therefore strongly safeguarded. In addition, the success of the German economy since World War II has meant that until recently there have been few strains on economic integration. Provincial and local governments have not, until recently, been beset by unemployment problems.

As a result of all the foregoing, one may say that there is in practice less of a mobility problem in Germany than in Canada in overall terms and specifically with regard to the following:

- agricultural marketing
- government purchasing
- technical standards
- the transport system
- purchase of land by out-of-state citizens
- takeovers of companies by out-of-state interests
- the movement of workers, professionals and university students
- private pensions
- securities regulation
- taxation.

On the other hand, there may be more of a problem than in Canada with regard to secondary education and to an unwillingness to give up publicly-provided low-rental housing.

The principal area in which the provincial authorities, through their own legislation, can affect mobility is in industrial and regional development. The main public program in Germany to promote regional development is operated jointly by the federation and the provinces, so that harmful competition is confined to programs outside the joint scheme. In this matter too, then, the problem is somewhat more manageable in Germany than in Canada. More detailed information on these subjects appears in the following pages.

## GOODS, SERVICES AND CAPITAL

### Constitutional provisions principally related to economic mobility

Subject to a number of basic rights which assure individuals freedom of movement, that are described below in the section entitled, *PEOPLE*, the federation may legislate on almost any matter that directly or indirectly affects economic mobility. The provinces have little power to affect mobility by legislation.

The most important legislative provisions that expressly concern economic mobility are as follows:

- Legislation on "freedom of movement" and on "the unity of the customs and commercial territory" is the exclusive responsibility of the federation (Article 73 of the Basic Law, sub-sections 3 and 5).

- The "law relating to economic matters," as well as many other matters that affect internal mobility are included in the catalogue of concurrent legislative powers (Article 74). Most of these concurrent areas have been occupied and thus "pre-empted" by the federation. The federation, under Article 72(2), has a right to legislate in concurrent areas when certain conditions obtain, including any situation where "the maintenance of legal or economic unity . . . necessitates such regulation."

Not only is the legislative authority of the federation with regard to mobility expressly stated, it is also supported by abundant legislative authority relating to matters that indirectly affect mobility, such as civil law, labour law, the abuse of economic power, land use, the environment and transport (see Article 73, page 252, and Article 74, page 252).

## Goods and services

### • Agriculture

Agriculture is a concurrent field of legislation: the relevant articles are 74(17) to 74(20). However, both levels of government have yielded marketing jurisdiction to the EEC. The marketing of all important agricultural products in Germany is covered by the common agricultural policy of the community. Member states of the EEC are left with measures relating to structural improvements and to various administrative matters. The provinces have no role in marketing.

### • Energy

Energy is also a concurrent field. Legislation on the "supply of power" and "mining" comes under Article 74(11), and this covers legislation on electricity, coal and other fuels. Article 74(11a) covers nuclear energy.

Germany has no important oil and gas deposits, whether on land or in the North Sea, but there are major coal deposits. Public acquisition of natural resources is a concurrent power under Article 74(15).

Coal is a subject that causes some friction between provinces. Those that have substantial coal deposits, such as North-Rhine Westphalia and the Saarland, want German coal to be used in Germany. Coastal provinces, on the other hand, want access to imported Polish and U.S. coal.

While nuclear energy is covered by federal law, the licensing of plants is a matter for provincial authorities. They are less ready to license construction than the French central authorities. One comment, not from a federal official, that illustrates the national impatience with provincial actions that disrupt integration and uniformity, was that "the federal structure has helped to weaken our competitive position regarding nuclear energy; in several years France will be able to export electrical energy to Germany."

All taxes on gasoline and heating oil go to the federal treasury. No Bundesrat consent is required for these taxes.

### • Government purchasing preferences

According to officials, government purchasing preferences are not a problem. It would be illegal for the provinces to legislate or announce preferences for local suppliers. EEC rules apply to the larger contracts. For both these and smaller contracts, Land purchasing procedures are supervised by the Land audit office (*Rechnungshof*). Tenders must be invited. Public service law places an obligation on ministers and public servants not to do anything that injures the interests of the Land. They could be sued for giving such a preference. In minor purchases and in some larger ones, there is, however, occasionally room for a limited amount of discretion; local suppliers can then be favoured, and this does happen, but it would not be openly admitted.

### • Insurance

Private insurance is a concurrent field under Article 74(11). A federal office, the *Aufsichtsamt*, supervises the terms of policies, and the federal economics ministry supervises the tariffs.

Automobile insurance is privately operated. One provincial official specializing in constitutional matters stated that it would be impossible for a province to introduce a state-run scheme, presumably because the federation has pre-empted the field. The federal competition office, the *Kartelamt*, issues lists comparing premiums charged by the various private companies. If a provincial government considered premiums too high it could complain to the *Kartelamt*.

### • Pipelines and transmission lines

These are not specifically mentioned in the Basic Law, but their construction and operation are presumably subject to Article 73(5), which gives the federation exclusive jurisdiction over the "freedom of movement of goods."

### • Standards: health, safety and technical

There is concurrent jurisdiction under Articles 74(19) and (20) relating to trade *inter alia* in medicines, food, drink, tobacco, plants, agricultural products and animals. Prescribing quality standards for goods is covered by federal legislation. For example, the Food Law (*Lebensmittelgesetz*) covers foodstuffs. Sizes of cans are prescribed by federal law as is advertising and labelling.

However, a number of standards and labelling requirements are being superseded by EEC laws. For example, some Germans are complaining that the EEC is going to impose brewing standards for beer that are contrary to German tradition.

One Land official says a province may prohibit the sale of dangerous products, "but we try to co-ordinate with other Laender." It is not clear whether this authority to prohibit derives from Land legislative jurisdiction or from permissible discretion in the administration of a federal law.

- **Transport**

The federal authority over road transport is larger than in Canada, but port facilities are operated by the provinces, and Bremen and Hamburg receive special compensation for this in the inter-Land equalization arrangements. There are numerous constitutional articles that relate to transport (see the index to the Basic Law), including:

| | |
|---|---|
| Article 73(5) | The freedom of movement of goods is an exclusively federal responsibility. |
| Article 73(6) | "Federal railroads and air transport" are exclusively federal. The major railway network is, in fact, operated by the *Deutschebundesbahn* (federal). |
| Article 74(23) | "Non-federal railroads, except mountain railroads," are under concurrent jurisdiction. |
| Article 74(22) | "Road traffic, motor transport, construction and maintenance of long-distance highways as well as the collection of charges for the use of public highways by vehicles and the allocation of revenue therefrom"—concurrent. |
| Article 90 | The federation owns the *autobahns* and other federal highways constructed prior to 1949. |

In 1974, road expenditures were divided fairly equally among the three levels of government.

National (federal) roads are financed by the federation but the planning is essentially a Land responsibility. In theory, under Article 90, the provinces administer the national roads as agents of the federation. However, in practice they administer them as though they had direct jurisdiction: they have considerable discretion about how federal funds are spent. Long-term plans for national roads are discussed in the Bundesrat, and this can give rise to keen controversy among the

Laender. The Bundestag's contribution to the financing of roads is nevertheless important. In the summer of 1980 it voted a new law to curb road construction to reduce federal expenditure.

There is no serious controversy over railway freight rates, as there has been in Canada. Three factors probably contribute to this: Germany's smaller size; the "transparency" of railway tariffs and subsidies (there is a subsidy on coal, for example); and provincial representation in the administration of the *Bundesbahn*.

### Capital

The relevant constitutional articles are those that are principally related to economic mobility in general.

#### • The purchase of real property

No German province has the constitutional power to prevent the purchase of real estate by non-resident Germans on a discriminatory basis, and such a law in any case would be considered "intolerable." Agricultural land and historical monuments may be protected, as may public access to lakes, but action must be non-discriminatory. Foreigners could, in theory, be required to seek permission to buy real property, but there are apparently no laws to this effect.

#### • Takeovers

Takeovers by German firms from outside a province would usually not be resented and might be welcome if jobs were assured. Bavaria could be an exception, particularly regarding financial institutions, but there is no legal possibility for a province to block a takeover. One senior official from a small Land said that "the Laender would not care and they probably would not know in advance." Those interviewed said it was essentially a matter for the federal *Kartelamt*, which administers federal competition laws.

It was pointed out that in the late fifties the Bavarian automobile producer, BMW, was having difficulties and would have been absorbed by Mercedes had not a northern German family intervened, preserving BMW as a distinct Bavarian entity.

## PEOPLE

### Constitutional provisions related to personal mobility

Personal freedom of movement and freedom to choose a profession are assured by basic constitutional rights. Provincial constitutions must respect basic rights, and this is to be ensured by the federation (Article 28). Apparently there is no case law, except with regard to foreigners: "the freedom of movement of Germans has long been settled and is beyond question." The only problem that those interviewed could name is the difficulty for teachers to move from one province to another when the supply of teachers exceeds demand.

It happens often that a citizen will live in one Land and work in another. The fact that income and sales taxes are uniform simplifies the matter.

Article 11(1) accords a basic right: "All Germans shall enjoy freedom of movement throughout the federal territory." Under sub-article (2) the right may be restricted, by federal law, e.g., to combat epidemics, to protect young people from neglect, and to prevent crime.

Everyone is required to register, with a public agency, any change of residence or domicile, and this registration is administered by the Laender. Under Article 75(5) the federation has the right to enact skeleton provisions (a framework law) concerning these matters, and it has done so (*Bundesmeldegesetz*). Among other things, the law restricts the number of questions a citizen may be asked by the authorities. The question of data banks is a sensitive and current issue.

In addition to the basic right to move freely throughout the federal territory there is the right to choose an occupation under Article 12(1):

> All Germans shall have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law.

To the extent that the practice of occupations is regulated by law, it would be federal law that applies (see below).

## Workers other than those in the professions

Labour law is a concurrent field under Article 74(12), but the field is heavily occupied by the federation. "Labour law is federal," said one Land official. Wage negotiations are conducted on a national basis by unions covering broad industrial groupings, e.g., all metalworkers, steelworkers or construction workers, in whatever region they live. The salaries and working conditions of all public employees, whether federal or provincial, and including teachers and professors, are negotiated nationally, with the joint participation of the federal and provincial governments, according to the terms of a federal law under Article 74a.

Many foreign workers have been admitted to Germany, and many have taken advantage of the country's liberal laws on political asylum. A province may not restrict the freedom of movement of a foreign worker who has the full authorization of the Federal Labour Office to work in Germany. If he is a citizen of an EEC member state, EEC rules would also apply: an attempt by France to confine foreign EEC nationals to a particular area of France was declared illegal by the Luxembourg court.

## The professions

National negotiations for public employees cover, or the results are extended to, professionals such as teachers and professors. The negotiations include common pension arrangements. There are problems for teachers who move from one province to another when unemployment is high. There may also be problems for notaries, although the legal profession and notaries are part of concurrent jurisdiction under 74(1). Also concurrent, under 74(19), is admission to the medical profession and to other health occupations or practices. Given the Constitutional Court's rulings on access to university places (see below), it would be difficult for provincial authorities to discriminate against professionals from outside the province, although the situation regarding teachers suggests it is not impossible.

## Access to social security benefits

Social insurance, including unemployment insurance, is a concurrent field, under Article 74(12). Article 87(2) provides that "social insurance institutions whose sphere of competence extends beyond the territory of one Land shall be administered as federal corporate bodies under public law." Social insurance has, in fact, been well-established in Germany since the days of Bismarck, and the legislation in this field relating to pensions, health, unemployment and so on is federal. The insurance programs are administered by semi-autonomous institutions that receive subsidies from the federation. The self-employed are not obliged to participate.

The economic viability of hospitals and the regulation of hospital charges are concurrent jurisdiction under 74(19a). Hospital insurance schemes (*Krankenkassen*) are supervised by the provinces, and for this reason the Bundesrat has had to approve the federal legislation in this field. Accident insurance is federal. Public welfare is concurrent under 74(7). Legislation on social assistance is, in fact, federal, although the provinces and municipalities administer and may supplement the federal payments. In 1974, municipal expenditure on social assistance was roughly equal to the total amount spent by the two other levels of government.

Unemployment insurance is legislated federally and administered by a public law institution that runs the local labour offices and also undertakes the retraining of workers. There are no labour offices run by the provinces.

Pensions and disability insurance are legislated federally and administered by two public law institutions, one for white collar workers (*Angestellten*) and one for other workers (*Arbeiter*). There are federal subsidies. Since the public pension scheme is, in relation to earnings, relatively more important than in Canada, the problem created for mobility by non-transferable private pensions is smaller in Germany. Private insurance is federally supervised.

Housing is a concurrent field under 74(18). There is a public housing program (*Sozialwohnungsbau*) that is financed equally by the federation and the provinces. Fear of losing privileged public housing is a deterrent to moving.

To sum up, social security is a concurrent field in which legislation is almost entirely federal. Administration is either by federal public law bodies or, in the case of sickness insurance, social assistance and housing, by the Laender and municipalities. There are no significant problems of access to social benefits for people who move from one province to another.

## Political rights of migrants

The federal framework law relating to change of domicile also covers political rights such as voting. There are a few months' wait before migrants can vote in local elections.

## Excluding workers from another province

A province may not discriminate against, or exclude, German or EEC workers from outside the province. It has already been noted that the freedom of movement of non-EEC foreign workers, who have full federal permission to work, may not be restricted by a province, although there are exceptions for certain professions, such as the profession of physician.

## OTHER POWERS AND POLICIES RELATING TO FREE MOVEMENT

### Competition policy

Competition law in Germany is particularly interesting because it operates on three levels: the EEC, the federation, and the province. The two jurisdictional borderlines are determined by a typical intrastate-interstate distinction. A province is concerned only with activities whose effects are confined within its borders. In practice, the provincial sphere of competence is very small. It would cover, for example, a case where several firms conspire to fix bids for the construction of a new museum, or the merger of two local financial institutions. The competent authorities in the provinces are usually adjuncts of the provincial ministry of economics.

The federal competence is large, and Germany prides itself on having both an effective law and an effective staff to administer it. Together they are supposed to compose, among the EEC countries, the most vigorous deterrent to anti-competitive practices. The federal law is administered by the federal *Kartelamt* in Berlin. Presumably, it draws most of its authority from the concurrent power under Article 74(16): "Prevention of the abuse of economic power." Also, Article 73(9) gives the federation exclusive power over industrial property rights and copyrights. The *Kartelamt* is supervised by an independent five-person Monopolies Commission. The commission issues a report every two years on the *Kartelamt's* activities relating to mergers and on concentration in the economy.

One particular preoccupation of the *Kartelamt* is to reinforce Germany's dedication (it is especially the dedication of the conservative parties) to the preservation of the middle class, a policy known as *Mittelstandspolitik*. The impoverishment of the middle class in the 1920s is believed to have promoted the coming into power of the Nazi regime. It is German policy to promote the success of small and medium-sized businesses; they are permitted to co-operate in a way that is denied larger firms.

The EEC has an active interest in competition policy to ensure that the economic and political gains to be expected from economic integration are not frustrated by anti-competitive business practices. The EEC competition law is applied rather than national law when business practices "appreciably" affect trade across frontiers within the common market.

The EEC Commission has few procedural encumbrances in prosecuting its competition policies,[12] and one might reasonably suppose that where its jurisdiction overlaps with that of the national authorities, the latter would leave the commission to do "the dirty work." One well-qualified independent observer says that this is not the case with Germany. However, the fact is that the commission's activities are tending to displace those of the *Kartelamt*. A business association official stated that:

> . . . for most German companies the European market is relevant, rather than just the German market. A takeover in the auto industry is now a European question, not a national one. What would avoid the attention of the Commission five years ago would not succeed in avoiding it today, so one cannot say that the EEC law is being weakly enforced. The Commission has an appreciably larger staff than the *Kartelamt*.

### Consumer protection

Reference has already been made to health standards, quality controls, labelling and dangerous products. The *Kartelamt* concerns itself also with misleading advertising. However, in this field, as in others, national laws are being overlapped by those of the EEC. For example, with regard to the proposed EEC regulations concerning beer, it has been suggested that containers should be marked with the date after which the beer should not be consumed.

### Long-term and structural policies

#### • Education and vocational training

As is common in federal systems, education in Germany is basically the responsibility of the provincial authorities. However, the German federal government participates much more extensively in this field than does the Canadian federal government. These are some of the federal activities:

- participation in the planning and financing of university construction through the joint tasks mechanism (Article 91a of the Constitution, elaborated in the Law on the Promotion of University Construction, 1970)

- participation in joint planning and financing of scientific research (Article 91b)

- framework legislation regarding "the general principles covering higher education" (Article 75)

- participation in the preparation of plans "for the coherent development of the entire educational system" (Article 91b)

- participation in the annual negotiations of teachers' and professors' salaries and working conditions (Article 74a)

- a concurrent power in "the regulation of education and training grants and the promotion of scientific research" (Article 74(13)).

With regard to the third item listed, the framework legislation concerning the general principles covering higher education, the Universities Framework Law passed pursuant to Article 75 is, in fact, a very detailed law. One reason was that the provincial governments wanted increased control of the universities and believed this would be easier to accomplish by uniform action. This law "established the basic principles for dealing with major issues in tertiary education, including: the effectiveness of courses; admission, enrolments and graduation requirements; teaching and research; and, to a lesser degree, the organization of universities, matters of administration, . . . and the participation of various groups."[13]

With regard to the fourth item, federal participation in the preparation of plans for the coherent development of the entire educational system, a Bund-Laender Commission with a typical joint tasks voting mechanism was set up in 1970.[14] Under such a mechanism, decisions can be taken only if the federation and at least six of the 11 provinces agree. (Berlin counts as a full province for this purpose.) The federation's voting position in the commission, in concert with SPD-governed provinces, has enabled it "to impose its educational concepts on the provinces on several occasions." The long-term plan drawn up by the commission and adopted by the federation and provincial governments in 1973 covered everything from pre-school to adult education. It "has had considerable influence on the general discussion of educational concepts in Germany."[15]

Despite the substantial federal role, the provinces have been able to impose their own policies on the development of the educational system. So far as secondary education is concerned the SPD-governed provinces, generally in the northern half of the country, have favoured the introduction of comprehensive schools, whereas the conservative southern provinces have preferred to retain the traditional arrangement whereby children are divided into "streams," with academic or practical emphasis. There is now a marked difference between the two systems, and it is a difference that is much resented by people who move from one province to another.[16] One consolation to parents is that children may commute to school across any jurisdictional border in the federal republic without payment of fees. Fees would imply discrimination and therefore would be unconstitutional.

At the university level there is, in effect, a single national "market" for university places. This is because decisions of the Constitutional Court have played an important role in stimulating co-ordination of admissions policies as well as in protecting universities from too much government direction. Since the early seventies university places have been scarce and quantitative restrictions have been applied on admission to some subjects of study (*numerus clausus*). The court decided that *numerus clausus* contravened Article 12(1), which gives Germans the right, *inter alia*, to choose "their place of training." Various practices of the provinces that were designed to give preference, including lower fees, to their own residents have also been disallowed by the court. However, the court was "practical enough to acknowledge that, until there are enough places to go around, rationing will have to stay."[17] As a result of a 1972 decision by the court, "federal and provincial governments were made jointly responsible for distributing study places and for assessing . . . university capacities."[18] By agreement of the First Ministers' Conference, the provinces established a central office to allocate university places on a national basis. A computer in Dortmund matches qualifications and students' preferences, and allocates vacancies. Some places are allocated according to an aptitude test and the rest by lottery.

So far as vocational training is concerned, Article 74(13) establishes a concurrent legislative power for "the regulation of educational and training grants and the promotion of scientific research." Vocational training relies heavily on the apprenticeship system, which typically involves a combination of on-the-job training and a formal course of instruction. Nearly half of those who leave school at the earliest permitted time take such apprenticeships, whether in the manufacturing or service fields. There are about 470 recognized occupations requiring formal training.

Vocational training is acknowledged to be a joint responsibility of private enterprise and government. The federation is responsible for the training directives, while the provinces run the vocational schools. The training directives are worked out with the business firms and the unions, specifying the length and program of training. In the mid-seventies, with increasing unemployment, training places were becoming scarce in business. A federal law of 1976 requires an annual inventory of training places. If there is a shortage in relation to demand, the government is empowered to impose a financial charge on larger firms; the money would be used to pay firms willing to accept more trainees.

- **State aids to industry and regional development**

In Germany, available jobs have until recently exceeded the number of people seeking work, and even today the unemployment levels do not vary greatly among the provinces as they do in Canada. Manufacturing and urban settlement are more evenly dispersed than in Canada, and per capita gross domestic product varies less among the provinces than in Canada.[19]

One would, therefore, not expect government intervention in industrial and regional development to be high. In fact, intervention by the federation and the provinces is significant, and intervention by the municipalities has recently become significant too. At the federal level this is because of the national commitment to the uniformity of living conditions, and the pressure for equal treatment by the various provinces. At the provincial level, this field is the principal one where the Laender can affect the economy, where they can have an economic policy, and where their competitive instincts, which of course have salutary as well as negative effects, can find an outlet.

In the Basic Law, the commitment to the uniformity of living conditions is mentioned in Articles 72 and 106. So far as industrial and regional development is concerned, the relevant constitutional articles are the concurrent 74(11), laws relating to economic matters; 75(4), which gives the federation authority to legislate a framework law for, *inter alia*, regional planning; and 91a, which gives the federation the right to participate in the discharge of certain responsibilities of the provinces, including the improvement of regional economic and agrarian structures, as a joint task.

There are many federal and provincial government activities that are related to industrial and regional development. They include expenditures on transport facilities, tax write-offs for various investments (federal only, but with Bundesrat consent), subsidies for the encouragement of research and technology, and, with strong EEC input, policy related to the iron and steel industry. There is no explicit national industrial strategy in the sense that there is a known policy that certain industries are to be encouraged to grow and others to disappear.

The most important program specifically aimed at regional development is the one established under the joint tasks authority. The designated development areas cover about one-third of the population, and 60 per cent of the territory of the federal republic. Within the designated areas, industries locating in Berlin and the territory along the border with East Germany (the *Zonenrandgebiet*) get higher grants than elsewhere. The federation and provinces have agreed on a growth centre (*Schwerpunktort*) approach, and on common criteria for the designation of a labour market region as one qualifying for assistance. A certain measure of assistance must be given to firms locating in a designated area that meet certain conditions. Additional assistance is given at the discretion of provincial authorities. Some provinces tend to give the disposable funds to individual firms while others tend to use them to develop infrastructure.

The successive five-year plans that are agreed on by the federation and provinces have the advantage of giving transparency to regional development aid and of articulating, for all concerned, the national objectives.

> These plans ensure the integrated utilization of the full range of instruments, which are solely designed to further regional policy. To this extent they are obligatory. They also function as guidelines (non-obligatory) for federal and provincial planning in other fields of relevance to regional policy, especially transport, housing and urban renewal.[20]
>
> Measures in force prior to the adoption of (these plans) are described in the public literature as "the earlier tangle of measures which gave the impression that development aid was applied to almost everything everywhere."[21]

The joint tasks regional development program is managed by a federal-provincial committee chaired by the federal minister of economics and composed of the federal minister of finance and one minister from each of the 11 provinces. Voting follows the usual joint tasks pattern: a decision requires the consent of the federation and at least six of the provinces. "Decisions are usually taken unanimously, except at election times."

The cost of the joint tasks program is borne equally by the federation and the provinces. Some receipts from the EEC regional fund are used to defray part of the cost.

While the provinces have raised objections to some of the joint tasks programs in other functional areas, such as university construction, the scheme related to regional development is generally recognized as useful, particularly by the less wealthy provinces which see it as an invaluable supplement to their financial equalization. All provinces seem to agree that some form of co-ordination is necessary. Ultimately, the federation has the legal authority to propose a scheme for the co-ordination of subsidies that could give the provinces less flexibility than under the present scheme, but the present scheme is not likely to collapse.

There are, however, differences of opinion among the provinces regarding the criteria used for determining the designation of labour market regions as ones that qualify for assistance. In 1980, three criteria were being used, with the weighting of 2-2-1 respectively: shortage of jobs, income, and infrastructure. The result of applying these criteria is that the designated development areas are typically rural and agricultural, with little industry and few public services.

In the last few years, unemployment has visited the more industrialized regions. This has been a factor in leading a number of the provinces to operate their own incentive programs outside of the joint tasks program. North Rhine Westphalia, the most populous and one of the richer provinces, is the foremost example. It has, however, so far agreed to keep its incentives at a rate lower than the ones offered by the joint scheme, which prescribes ceilings for development aid both within and outside the designated development areas. The scheme therefore imposes a discipline on all development aid. However, the activity of North Rhine Westphalia, as of other provinces, must be assumed to bring pressure for a revision of the joint scheme's criteria. This illustrates how a heavyweight province, despite its having in the operation of the joint scheme a vote no greater than any other province, is able to increase its proportionate influence.[22]

The designated areas for 1981 and subsequent years were to be redrawn, as the result of the 1980 census, and perhaps as the result of introducing new criteria; but it is not possible to say whether North Rhine Westphalia and other provinces are as a result likely to substantially diminish their outside development aid. This outside aid is composed, for example, of "fully developed industrial sites, and generous financial assistance."[23] The provincially-owned banks (*Landesbanken*) will lend money, and the loans are sometimes guaranteed by the province. Income tax incentives are ruled out because income taxes are legislated federally.

Bavaria is second only to North Rhine Westphalia in the size of its outside development aid. It prefers to see aid go to rural rather than industrial areas; the joint scheme likewise favours the former, although there has been some movement away from this bias. But Bavaria also has a particular interest, which is not in its view adequately reflected in the joint scheme: the encouragement of small and medium-sized enterprises. The conservative Bavarian government's political philosophy is to reinforce the *Mittelstandpolitik* (encouragement of the middle class) rather than to reinforce the growth of an industrial proletariat.

The local level of government also is active in soliciting businesses to locate, and this is considered an increasing problem by federal and provincial officials. Local government is in practice less subject to provincial financial pressure than it is in Canada, even though there are substantial fiscal transfers from the provinces. Also, some provinces probably connive at local activity. The local authorities compete with others, in the same or in other provinces, by offering a lower business tax, the *Gewerbesteuer*, the proceeds of which are shared by all governments. However, there is a limit: the local authority must be careful not to discriminate against other taxpayers within its borders. This tends to rule out a tax holiday for individual firms. A valuable incentive offered by local authorities is cheap land, which can be worth more to a firm than the incentives offered under the joint tasks scheme.

In Germany, pervaded as it is by party political allegiances, the local government activity in industrial development, as in other things, sometimes gives people a choice between dealing with a government of one party at the local level (e.g., the CDU in Frankfurt) or with another party at the provincial level (e.g., the SPD in Hessen).

Although the provincial ministers of economics meet two or three times a year, usually with the federal minister present, they have not chosen to intervene effectively in the competition for industry that goes on outside the joint scheme. Representatives of the four northern provinces meet periodically, and one of their tasks is to prevent excessive competition in such matters as the improvement of port facilities. However, according to officials, this task is "very difficult."

There are other federal and provincial programs that affect industrial and regional development. An important one is federal assistance for research and technology. The federation has an annual budget of about $3 billion for this purpose. One criticism is that the money is distributed inequitably among firms.[24] From the point of view of some of the provinces, too much money goes where there are already major industrial and research establishments. Whereas many federal grants, including those of the various joint task schemes, tend to be distributed among the provinces almost on an equal per capita basis, or at least with close regard for "equity,"[25] this does not appear to be the case with research grants. In 1979, Bavaria, with a population only one and a half times as large as Lower Saxony, received seven times as much in research grants.

To summarize, industrial and regional development (*Strukturpolitik*) is the principal area where the provinces can affect the free movement of goods, people and investment. The main vehicle for regional development is the joint scheme, which brings discipline to interprovincial competition, both within and to some extent outside the scheme. Competition outside the scheme is a problem for the smaller, less industrialized provinces.

On general the criticism is that the scale of regional development expenditures is unnecessary in a country like Germany. Also, it is shown quite convincingly by Bernd Reissert that the joint scheme's federal-provincial decision-making mechanism avoids intergovernmental conflict and the solving of problems in favour of spreading the money among the provinces on equal terms.[26]

Against these and other criticisms, the joint scheme has imposed some discipline on unhealthy competition, and despite the discontent of northern Germany, which is for various reasons (not all economic) losing some people to the south, it cannot be said that there is serious controversy about regional shares of industrial and economic activity, at least not in any way comparable to the controversy in Canada. Thus, even though the solution of some problems may have been avoided by equal treatment, that may be the price necessary to keep a federal system happy.

It is in any case doubtful that *Strukturpolitik* has had more than a marginal effect on the location of industry in Germany. Despite the fact that German firms produce for a world or European market, rather than a local market, and may therefore be presumed to be susceptible to inducements that persuade them to locate, some distance from where they had intended, most firms tend to locate in areas pre-determined by various natural advantages, such as the valleys of the Rhine and the Neckar.

### • Environmental protection

Federal legislation predominates, although some of it is framework legislation, and the provinces administer most of it. There is a federal co-ordinating office in Berlin.

A number of constitutional provisions are relevant, but among them may be noted two concurrent articles:

74(11a) Nuclear energy
74(24) "Disposal of waste, keeping the air pure, and combatting noise."

and two federal framework law articles:

75(3) "Hunting, protection of nature, and care of the countryside."
75(4) "Land distribution, regional planning and water management."

Article 89 relating to federal waterways also applies.

A 1977 official publication stated that "Chancellor Schmidt is considering embodying a fundamental right to environmental protection in the Basic Law."[27]

Since Germany shares borders and important rivers with a number of other countries, the international aspects are particularly important. The EEC has some responsibilities.

Federal legislation, like EEC policy, is based heavily on the "polluter pays" principle. The legislation includes the following:

- framework legislation on water management, plus legislation (See also the Effluency Levies Act below).
- Waste Disposal Act, covering many types from household refuse to wrecked cars
- The Nature Conservation and Landscape Management Act which covers landscape planning and protection of animals and plants
- Emission Protection Act, covering air pollution, noise and radiation
- Petro Lead Concentration Act, which covers lead content of fuel (The provisions are now co-ordinated with EEC countries).
- Effluency Levies Act provides *inter alia* for an effluency fee calculated on a uniform basis throughout the federal republic.

It is said that the degree of enforcement of federal air pollution legislation varies among the provinces, and that a few of them have recently asked for relaxation of federal water pollution legislation, presumably the Effluency Levies Act of 1978.

## Commercial infrastructure

### • Banking

Article 88 states that "the Federation shall establish a note-issuing and currency bank as the Federal Bank." This, the central bank, is the *Deutsche Bundesbank* in Frankfurt. Its administrative office in each of the provinces is called the *Landeszentralbank*.

The Central Bank Council is the governing body of the *Bundesbank*. It is composed of the *Bundesbank* board and the provincial central banks' presidents. It is more independent of government than many central banks, as suits a country that went through a "hyperinflation" in the twenties and a major currency reform following World War II. It determines monetary policy independent of directives from the Bonn government. The provincial central banks are said to have a major say in monetary policy. The presidents of these banks are nominated by the Bundesrat and appointed by the president of the federal republic. The other members of their executive boards are nominated by the Central Bank Council and appointed by the president of the *Bundesbank* for eight-year terms.

Banking legislation is otherwise a concurrent field under Article 74(11). The activities of all credit institutions in the federal republic are regulated by a federal law, the *Kreditwesengesetz*, and they are supervised by a federal office in Berlin (*Bundesaufsichtsamt fuer das Kreditwesen.*)

Commercial banking is dominated by three large banks, but the provinces operate savings banks, called *Landbanken*. They will loan to local industries and these loans may be guaranteed by the respective provincial government. The Bavarian *Landbank* is said to be large enough to hold its own in competition with the big three commercial banks.

German banks are unusual in the extent to which they hold equity positions in client companies and conduct the secondary markets in securities (see below). The linking effect of their representatives who sit on the boards of many major firms may well serve to restrict competition in ordinary commerce: "The cosy net of banks and business helps to keep contracts all in the family."[28]

## • Company law, commercial law, and securities regulation

Federal law prevails in each of these three areas: The German Civil Code (*Buergerliches Gesetzbuch*), which covers basic commercial law; the Companies Law (*Aktiengesetz*); and, for securities regulation, a combination of the Civil Code, the Companies Law, the Stock Exchange Law (*Boersegesetz*), and the banking laws. The provinces have supervisory responsibilities for stock exchanges; the exchanges are a concurrent area of jurisdiction under Article 74(11).

The notes below deal primarily with securities regulation: first, shares in limited liability companies, and secondly, bonds. Apart from the predominance of federal law, the main differences from Canada are the major role of the banks and the use of bearer shares rather than registered shares. Regulation of securities issuance and trading is not as extensive in Germany as in the United States. EEC directives are beginning to impinge, but so far only slightly, on the securities regulation in member states.

The formation of a company is governed by the Companies Law. New issues of shares are typically underwritten by a consortium of banks. The shares must, to be publicly traded, be admitted to a stock exchange. The leading bank in the share issue, which is usually a member of the exchange, guarantees the accuracy of the prospectus. The publication of a prospectus is one of the conditions that are laid down in the federal Stock Exchange Law. The exchange decides whether to allow any given shares to be traded; given the bank guarantee, there is never any obstacle.

The Stock Exchange Law prescribes a framework for the organization of the exchanges. The law is implemented by the provinces and requires the consent of the Bundesrat. For each exchange there is a commissioner, appointed by the provincial government, who ensures that the exchange is properly run. He licenses the exchange, and the exchange decides on the admission of individual members. The most important group is the banks. Only they may bring private orders to the exchange for purchase or sale. In addition to the banks there are jobbers.

There are eight exchanges in the Federal Republic. The largest is in Frankfurt, closely followed by Duesseldorf and Munich. No province has more than one; three have none. The fees are the same, but each provincial commissioner must approve the fee schedule for his particular stock exchange.

The Companies Law is based on bearer shares rather than registered shares; the latter are used in the United States, Canada and the United Kingdom. This makes trading and daily clearing simpler. Also, it is one of the reasons why there is less interest than in the United States in establishing a national market system for stock exchange transactions.

The issuance of bonds of companies domiciled in the federal republic must be approved by the federal ministry of finance. The Civil Code lays down certain requirements that relate to the credit-worthiness of the borrower. The ministry has the authority to control the timing of issues, but in fact there are very few.

Bonds issued by provincial and municipal public authorities are not subject to ministry of finance approval. However, when the economic situation so requires, the federal government may, with Bundesrat approval, pass a decree, following which the Business Cycle Council (*Konjunkturrat*) will set the amounts, terms and timing of credit on loan raisings for all three levels of government. All three levels are represented on the council, and the central bank (*Deutsche Bundesbank*) has the right to participate at council meetings. The government's decree is valid for one year, unless within six weeks Parliament asks for it to be annulled.

Unit trusts and investment companies are regarded as banks and are subject to the supervision of the federal office in Berlin, which supervises the banks. Each unit trust or investment company must be licensed under the terms of a law that applies specifically to such institutions.

## • Taxation

Three of the four major taxes, that is, the personal and corporation income taxes and the value-added tax, are levied by the federation under legislation requiring Bundesrat consent. The fourth, the business tax, is levied by the municipalities.

A federal law requiring Bundesrat consent allocates, pursuant to Article 106(5), a share of the personal income tax to the communes (municipalities). The percentage they receive now is about 15 per cent. The balance of the personal and corporation income taxes must be divided equally between the federation and the provinces under Article 106(3). This provides an important guarantee of provincial autonomy and federal balance.

The value-added tax is apportioned periodically by federal law, also requiring Bundesrat consent, between the federation and the provinces. The present distribution is about 67.5 per cent and 32.5 per cent, but 1.5 per cent of the federal share is shared among several provinces with below-average per capita incomes.

It is apparent that the provinces are unable to use the major taxes in a way that purposely or inadvertently inhibits free movement, although the revenues from the less important wealth and inheritance taxes accrue to the provinces. Property taxes, which may include both net worth and inheritance taxes, in 1978 yielded an amount equivalent to about three per cent of the personal income tax yield.

The communes levy the business or manufacturing tax (*Gewerbesteuer*), the proceeds of which are shared with the federation and the provinces, although the communes keep about 60 per cent. The communes are not supposed to use the business tax to encourage the location of industry, but some do and "the Laender wink at the practice." The business tax in 1978 yielded an amount equal to about one-sixth of the personal income tax and slightly more than the corporation tax. The tax base for the business tax consists of profits (85 per cent of the base) and net asset value (15 per cent); the tax is deductible from taxable corporate income.

## MECHANISMS

What follows is a list of some of the mechanisms for intergovernmental co-operation, and of features of public programs, that may be of interest to Canadians with regard to free movement in Germany:

- the Bundesrat's role in federal legislation
- federal framework laws, e.g., regarding people who move
- uniform federal legislation, administered by the provinces, e.g., stock exchanges
- the joint tasks mechanism
- representation of the provinces in the administration of the federal railways
- Bundesrat nomination of the presidents of the provincial central banks
- the relatively large size of the pensions paid by the national scheme
- central allocation of university places
- the standard requirements of formal and practical training for many occupations and the apprenticeship system
- common tax laws and rates, with shared proceeds
- the supervision of the federal *Kartelamt*, which administers federal competition laws, by an independent monopolies commission.

# WORDING OF RELEVANT CONSTITUTIONAL ARTICLES

## EXCERPTS FROM THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY

Article 11 (Freedom of movement)

(1) All Germans shall enjoy freedom of movement throughout the federal territory.

(2) This right may be restricted only by or pursuant to a law and only in cases in which an adequate basis of existence is lacking and special burdens would arise to the community as a result thereof, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or a Land, to combat the danger of epidemics, to deal with natural disasters or particularly grave accidents, to protect young people from neglect or to prevent crime.[29]

Article 12 (Right to choose trade, occupation or profession)[30]

(1) All Germans shall have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law.

(2) No specific occupation may be imposed on any person except within the framework of a traditional compulsory public service that applies generally and equally to all.

(3) Forced labour may be imposed only on persons deprived of their liberty by court sentence.

Article 70 (Legislation of the Federation and the Laender)

(1) The Laender shall have the right to legislate in so far as this Basic Law does not confer legislative power on the Federation.

(2) The division of competence between the Federation and the Laender shall be determined by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.

Article 71 (Exclusive legislation of the Federation, definition)

In matters within the exclusive legislative power of the Federation the Laender shall have power to legislate only if, and to the extent that, a federal law explicitly so authorizes them.

Article 72 (Concurrent legislation of the Federation, definition)

(1) In matters within concurrent legislative powers the Laender shall have power to legislate as long as, and to the extent that, the Federation does not exercise its right to legislate.

(2) The Federation shall have the right to legislate in these matters to the extent that a need for regulation by federal legislation exists because:

1. a matter cannot be effectively regulated by the legislation of individual Laender, or
2. the regulation of a matter by a Land law might prejudice the interests of other Laender or of the people as a whole, or

3. the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of any one Land, necessitates such regulation.

### Article 73 (Exclusive legislation, catalogue)

The Federation shall have exclusive power to legislate in the following matters:

1. foreign affairs as well as defence including the protection of the civilian population;[31]
2. citizenship in the Federation;
3. freedom of movement, passport matters, immigration, emigration, and extradition;
4. currency, money and coinage, weights and measures, as well as the determination of standards of time;
5. the unity of the customs and commercial territory, treaties on commerce and on navigation, the freedom of movement of goods, and the exchanges of goods and payments with foreign countries, including customs and other frontier protection;
6. federal railroads and air transport;
7. postal and telecommunication services;
8. the legal status of persons employed by the Federation and by federal corporate bodies under public law;
9. industrial property rights, copyrights and publishers' rights;
10. co-operation of the Federation and the Laender in matters of
    (a) criminal police,
    (b) protection of the free democratic basic order, of the existence and the security of the Federation or of a Land (protection of the constitution) and
    (c) protection against efforts in the federal territory which, by the use of force or actions in preparation for the use of force, endanger the foreign interests of the Federal Republic of Germany,

    as well as the establishment of a Federal Criminal Police Office and the international control of crime.[32]
11. statistics for federal purposes.

### Article 74 (Concurrent legislation, catalogue)

Concurrent legislative powers shall extend to the following matters:

1. civil law, criminal law and execution of sentences, the organization and procedure of courts, the legal profession, notaries, and legal advice (*Rechtsberatung*);
2. registration of births, deaths, and marriages;
3. the law of association and assembly;
4. the law relating to residence and establishment of aliens;

4a. the law relating to weapons and explosives;[33]

5. the protection of German cultural treasures against removal abroad;
6. refugee and expellee matters;
7. public welfare;
8. citizenship in the Laender;
9. war damage and reparations;

10. benefits to war-disabled persons and to dependants of those killed in the war as well as assistance to former prisoners of war;[34]

10a. war graves of soldiers, graves of other victims of war and of victims of despotism;[35]

11. the law relating to economic matters (mining, industry, supply of power, crafts, trades, commerce, banking, stock exchanges, and private insurance);

11a. the production and utilization of nuclear energy for peaceful purposes, the construction and operation of installations serving such purposes, protection against hazards arising from the release of nuclear energy or from ionizing radiation, and the disposal of radioactive substances;[36]

12. labour law, including the legal organization of enterprises, protection of workers, employment exchanges and agencies, as well as social insurance, including unemployment insurance;

13. the regulation of educational and training grants and the promotion of scientific research;[37]

14. the law regarding expropriation, to the extent that matters enumerated in Articles 73 and 74 are concerned;

15. transfer of land, natural resources and means of production to public ownership or other forms of publicly controlled economy;

16. prevention of the abuse of economic power;

17. promotion of agricultural and forest production, safeguarding of the supply of food, the importation and exportation of agricultural and forest products, deep sea and coastal fishing, and preservation of the coasts;

18. real estate transactions, land law and matters concerning agricultural leases, as well as housing, settlement and homestead matters;

19. measures against human and animal diseases that are communicable or otherwise endanger public health, admission to the medical profession and to other health occupations or practices, as well as trade in medicines, curatives, narcotics, and poisons;

19a. the economic viability of hospitals and the regulation of hospitalization fees;[38]

20. protection regarding the marketing of food, drink and tobacco, of necessities of life, fodder, agricultural and forest seeds and seedlings, and protection of plants against diseases and pests, as well as the protection of animals;[39]

21. ocean and coastal shipping as well as aids to navigation, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic;

22. road traffic, motor transport, construction and maintenance of long-distance highways as well as the collection of charges for the use of public highways by vehicles and the allocation of revenue therefrom;[40]

23. non-federal railroads, except mountain railroads;

24. disposal of waste, keeping the air pure, and combatting noise.[41]

Article 74a (Wider competence of Federation for pay scales)[42]

(1) Concurrent legislation shall further extend to the pay scales and pensions of members of the public service whose service and loyalty are governed by public law, in so far as the Federation does not have exclusive power to legislate pursuant to item 8 of Article 73.

(2) Federal laws enacted pursuant to paragraph (1) of this Article shall require the consent of the Bundesrat.

(3) Federal laws enacted pursuant to item 8 of Article 73 shall likewise require the consent of the Bundesrat, in so far as they prescribe for the structure and computation of pay scales and pensions, including the appraisal of posts, criteria or minimum or maximum rates other than those provided for in federal laws enacted pursuant to paragraph (1) of this Article.

(4) Paragraphs (1) and (2) of this Article shall apply *mutatis mutandis* to the pay scales and pensions for judges in the Laender. Paragraph (3) of this Article shall apply *mutatis mutandis* to laws enacted pursuant to paragraph (1) of Article 98.

Article 75 (General provisions of the Federation, catalogue)[43]

Subject to the conditions laid down in Article 72 the Federation shall have the right to enact skeleton provisions concerning:

1. the legal status of persons in the public service of the Laender, communes, or other corporate bodies under public law, in so far as Article 74a does not provide otherwise;[44]

1a. the general principles governing higher education;[45]

2. the general legal status of the press and the film industry;

3. hunting, protection of nature, and care of the countryside;

4. land distribution, regional planning, and water management;

5. matters relating to the registration of changes of residence or domicile (*Meldewesen*) and to identity cards.

Article 89 (Federal waterways)

(1) The Federation shall be the owner of the former Reich water-ways.

(2) The Federation shall administer the federal waterways through its own authorities. It shall exercise those governmental functions relating to inland shipping which extend beyond the territory of one Land, and those governmental functions relating to maritime shipping which are conferred on it by law. Upon request, the Federation may transfer the administration of federal waterways, in so far as they lie within the territory of one Land, to that Land as its agent. If a waterway touches the territories of several Laender, the Federation may designate one Land as its agent if so requested by the Laender concerned.

(3) In the administration, development, and new construction of waterways the needs of soil cultivation and of water management shall be safeguarded in agreement with the Laender.

Article 91a (Definition of joint tasks)[46]

(1) The Federation shall participate in the discharge of the following responsibilities of the Laender, provided that such responsibilities are important to society as a whole and that federal participation is necessary for the improvement of living conditions (joint tasks):

1. expansion and construction of institutions of higher education including university clinics;
2. improvement of regional economic structures;
3. improvement of the agrarian structure and of coast preservation.

(2) Joint tasks shall be defined in detail by federal legislation requiring the consent of the Bundesrat. Such legislation should include general principles governing the discharge of joint tasks.

(3) Such legislation shall provide for the procedure and the institutions required for joint overall planning. The inclusion of a project in the overall planning shall require the consent of the Land in which it is to be carried out.

(4) In cases to which items 1 and 2 paragraph (1) of this Article apply, the Federation shall meet one half of the expenditure in each Land. In cases to which item 3 of paragraph (1) of this Article applies, the Federation shall meet at least one half of the expenditure, and such proportion shall be the same for all the Laender. Details shall be regulated by legislation. Provision of funds shall be subject to appropriation in the budgets of the Federation and the Laender.

(5) The Federal Government and the Bundesrat shall be informed about the execution of joint tasks, should they so demand.

Article 91b (Co-operation of Federation and Laender in educational planning and in research)[47]

The Federation and the Laender may pursuant to agreements co-operate in educational planning and in the promotion of institutions and projects of scientific research of supraregional importance. The apportionment of costs shall be regulated in the pertinent agreements.

Article 105 (Customs duties, Monopolies, Taxes—legislation)

(1) The Federation shall have exclusive power to legislate on customs matters and fiscal monopolies.

(2) The Federation shall have concurrent power to legislate on all other taxes the revenue from which accrues to it wholly or in part or where the conditions provided for in paragraph (2) of Article 72 apply.[48]

(2a) The Laender shall have power to legislate on local excise taxes as long and in so far as they are not identical with taxes imposed by federal legislation.[49]

(3) Federal laws relating to taxes the receipts from which accrue wholly or in part to the Laender or communes or associations of communes shall require the consent of the Bundesrat.

Article 106 (Apportionment of tax revenue)[50]

(1) The yield of fiscal monopolies and the revenue from the following taxes shall accrue to the Federation:

1. customs duties,
2. excise taxes in so far as they do not accrue to the Laender pursuant to paragraph (2) of this Article, or jointly to the Federation and the Laender in accordance with paragraph (3) of this Article, or to the communes in accordance with paragraph (6) of this Article,
3. the road freight tax,
4. the capital transfer taxes, the insurance tax and the tax on drafts and bills of exchange,
5. non-recurrent levies on property, and contributions imposed for the purpose of implementing the equalization of burdens legislation,[51]
6. income and corporation surtaxes,
7. charges imposed within the framework of the European Communities.

(2) Revenue from the following taxes shall accrue to the Laender:

1. property (net worth) tax,
2. inheritance tax,
3. motor-vehicle tax,
4. such taxes on transactions as do not accrue to the Federation pursuant to paragraph (1) of this Article or jointly to the Federation and the Laender pursuant to paragraph (3) of this Article,
5. beer tax,
6. taxes on gambling establishments.

(3) Revenue from income taxes, corporation taxes and turnover taxes shall accrue jointly to the Federation and the Laender (joint taxes) to the extent that the revenue from income tax is not allocated to the communes pursuant to paragraph (5) of this Article. The Federation and the Laender shall share equally the revenues from income taxes and corporation taxes. The respective shares of the Federation and the Laender in the revenue from turnover tax shall be determined by federal legislation requiring the consent of the Bundesrat. Such determination shall be based on the following principles:

1. The Federation and the Laender shall have an equal claim to coverage from current revenues of their respective necessary expenditures. The extent of such expenditures shall be determined within a system of pluri-annual financial planning;

2. the coverage requirements of the Federation and of the Laender shall be co-ordinated in such a way that a fair balance is struck, any overburdening of taxpayers precluded, and uniformity of living standards in the federal territory ensured.

(4) The respective shares of the Federation and the Laender in the revenue from the turnover tax shall be apportioned anew whenever the relation of revenues to expenditures in the Federation develops substantially differently from that of the Laender. Where federal legislation imposes additional expenditures on, or withdraws revenue from the Laender, the additional burden may be compensated by federal grants under federal laws requiring the consent of the Bundesrat, provided such additional burden is limited to a short period. Such laws shall lay down the principles for calculating such grants and distributing them among the Laender.

(5) A share of the revenue from income tax shall accrue to the communes, to be passed on by the Laender to their communes on the basis of income taxes paid by the inhabitants of the latter. Details shall be regulated by a federal law requiring the consent of the Bundesrat. Such law may provide that communes shall assess communal percentages of the communal share.

(6) Revenue from taxes on real property and businesses shall accrue to the communes; revenue from local excise taxes shall accrue to the communes or, as may be provided for by Land legislation, to associations of communes. Communes shall be authorized to assess the communal percentages of taxes on real property and businesses within the framework of existing laws. Where there are no communes in a Land, revenue from taxes on real property and businesses as well as from local excise taxes shall accrue to the Land. The Federation and the Laender may participate, by assessing an impost, in the revenue from the trade tax. Details regarding such impost shall be regulated by a federal law requiring the consent of the Bundesrat. Within the framework of Land legislation, taxes on real property and businesses as well as the communes' share of revenue from income tax may be taken as a basis for calculating the amount of such impost.

(7) An overall percentage, to be determined by Land legislation, of the Land share of total revenue from joint taxes shall accrue to the communes and associations of communes. In all other respects Land legislation shall determine whether and to what extent revenue from Land taxes shall accrue to communes and associations of communes.

(8) If in individual Laender or communes or associations of communes the Federation causes special facilities to be established which directly result in an increase of expenditure or a loss of revenue (special burden) to these Laender or communes or associations of communes, the Federation shall grant the necessary compensation, if and in so far as such Laender or communes or associations of communes cannot reasonably be expected to bear such special burden. In granting such compensation, due account shall be taken of third-party indemnities and financial benefits

accruing to the Laender or communes or associations of communes concerned as a result of the institution of such facilities.

(9) For the purpose of this Article, revenues and expenditures of communes and associations of communes shall be deemed to be Land revenues and expenditures.

## NOTES TO TEXT

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1. There is also implicit equalization arising from the way in which a portion of the proceeds of the value-added tax is distributed. A relatively poor province, Schleswig-Holstein, is said to receive 40 per cent of its budget from transfers and equalization. However, this probably includes EEC transfers related to the large agricultural sector of the province.

2. "Survey of the West German Economy," *The Economist*, November 8, 1980.

3. This federal law, like the law on construction of federal roads, falls under the category of administration called *Auftragsverwaltung*, whereby the federation is entitled to give instructions to the Land governments. There are also, for some subjects, federal framework laws. In this case, the province passes its own law, repeating the provisions of the federal law and adding detail of its own. It would then administer what is a Land law rather than a federal law, and different legal rules apply. For further information on framework laws, and other aspects of German federalism of interest to Canadians, see J. A. Hayes, "German Federalism Revisited," privately circulated paper, July 16, 1980.

4. Introduction to the *Basic Law of the Federal Republic of Germany*, Press and Information Office, Government of the Federal Republic of Germany, Bonn. The Bundesrat is a federal institution: the Land parliaments have no right to instruct the Land executives how to vote there. Each government's votes, which vary in number slightly with population, are cast as a block. See Government of Canada, *House of the Federation*, (Ottawa: Supply and Services Canada, 1978), pp. 25-26.

5. The CDU is, however, somewhat less integrated than the SPD.

6. The party representation in the electoral college is determined in a way that is essentially similar to the way in which the party representation in a reformed Canadian Senate would have been determined under Bill C-60 in 1978. See *House of the Federation*, p. 17.

7. One advantage of a politically-integrated federal system is that when different political parties hold office at different levels of government a citizen may be able to press his case through alternative channels, e.g., environmentally-concerned voters in a town in the CDU-governed Land of Baden-Wurttemburg were able to get a federal SPD deputy to intervene successfully to deprive a planned new highway of federal assistance. The municipal level is also party-affiliated.

8. It has been the case for much of the period since World War II that governments in Germany, at both the federal and Land levels, have been coalition governments. However, in the summer of 1980 there were only four among twelve: in Bonn, Hesse and Berlin (all SPD-FDP), and in the Saarland (CDU-FDP).

9. Nevil Johnson, *Federalism and Decentralisation in Germany* (London: H.M.S.O., 1973), pp. 3, 60.

10. This is also true of inter-Land relations. For example, three provinces co-operate in the operation of the second largest radio and T.V. station in Germany, the *Norddeutscher Rundfunk*. The two CDU-run Laender of Schleswig-Holstein and Lower Saxony were early in 1980 threatening to pull out of the joint arrangement because they said that broadcasting was dominated by left-wing elements. The third province, where the station is located, is SPD-run Hamburg.

11. The financial planning council, the *Finanzplanungsrat*, is a federal-provincial body that was intended to be an important co-ordinating mechanism. Its story has been well documented by Professor Jack Knott in "Federalism, Macroeconomic Guidelines, and Budget Policy in West Germany," (Paper given at the American Political Science Association meeting in September, 1977, in Washington).

12. See separate paper on the EEC.

13. Christian W. Zoellner, "Federal-Laender Relations in Education and Cultural Affairs in the Federal Republic of Germany," in R.L. Mathews (ed.), *Federalism in Australia and the Federal Republic of Germany*, (Canberra: ANU Press, 1980), p. 183.

14. For additional information on the Joint Tasks mechanism see J. A. Hayes, "German Federalism Revisited".

15. The quotations are from Zoellner, "Federal-Laender Relations", p. 183.

16. This is evidently the case, notwithstanding that "in no other federal state has the co-operation of its members achieved such a degree of standardization or co-ordination as has been reached by the efforts of the Conference (of Education Ministers)". Zoellner, "Federal-Laender Relations", p. 177.

17. *The Economist*, August 23, 1980, p. 42.

18. Zoellner, "Federal-Laender Relations", p. 177.

19. See figures for population and GDP in the German Laender in *The Economist*, "Survey of the West German Economy," November 8, 1980, p. 20.

20. Chapter VIII, p. 158, of a 1976 OECD report on regional problems. The chapter is a useful source regarding German regional development policy up to that date, i.e., before unemployment became a serious problem.

21. OECD Report, p. 163.

22. In the Bundesrat, and therefore in the basic legislation defining the scheme, the province has a slightly weighted vote. In the operation of the scheme each province has an equal vote.

23. Bavarian government advertisement, *The Economist*, November 8, 1980.

24. *The Economist*, Survey of the West German Economy, November 8, 1980, p. 20.

25. Bernd Reissert, "Responsibility Sharing and Joint Tasks in West German Federalism", in *Principles of federal policy co-ordination in the Federal Republic of Germany*, Canberra: Centre for Research on Federal Financial Relations, ANU, 1978.

26. Bernd Reissert, "Responsibility Sharing".

27. "Environmental Protection, Nature Conservation," Information pamphlet no. 9 published by the Press and Information Office of the Federal Republic of Germany, 1977.

28. *The Economist*, "Survey of the West German Economy," November 8, 1980, p. 20.

29. As amended by federal law of June 24, 1968, (*Federal Law Gazette*, p. 709).

30. As amended by federal laws of March 19, 1956, (*Federal Law Gazette*, p. 111) and June 24, 1968, (*Federal Law Gazette*, p. 709).

31. As amended by federal laws of March 26, 1954, (*Federal Law Gazette*, p. 45) and June 24, 1968, (*Federal Law Gazette*, p. 711).

32. As amended by federal law of July 28, 1972, (*Federal Law Gazette*, p. 1305).

33. Inserted by federal law of July 28, 1972, (*Federal Law Gazette*, p. 1305) and amended by federal law of August 23, 1976, (*Federal Law Gazette*, p. 2383).

34. As amended by federal law of June 16, 1965, (*Federal Law Gazette*, p. 513).

35. Inserted by federal law of June 16, 1965, (*Federal Law Gazette*, p. 513).

36. Inserted by federal law of December 23, 1959, (*Federal Law Gazette*, p. 813).

37. As amended by federal law of May 12, 1969, (*Federal Law Gazette*, p. 363).

38. Inserted by federal law of May 12, 1969, (*Federal Law Gazette*, p. 363).

39. As amended by federal law of March 18, 1971, (*Federal Law Gazette*, p. 207).

40. As amended by federal law of May 12, 1969, (*Federal Law Gazette*, p. 363).

41. As amended by federal law of April 14, 1972, (*Federal Law Gazette*, p. 593).

42. *As inserted by federal law of March 18, 1971, (Federal Law Gazette,* p. 206).

43. As amended by federal law of May 12, 1969, (*Federal Law Gazette*, p. 363).

44. As amended by federal law of March 18, 1971, (*Federal Law Gazette*, p. 206).

45. Inserted by federal law of May 12, 1969, (*Federal Law Gazette*, p. 363).

46. Inserted by federal law of May 12, 1969, (*Federal Law Gazette*, p. 359).

47. Inserted by federal law of May 12, 1969, (*Federal Law Gazette*, p. 359).

48. As amended by federal law of May 12, 1969, (*Federal Law Gazette*, p. 359).

49. Inserted by federal law of May 12, 1969, (*Federal Law Gazette*, p. 359).

50. As amended by federal laws of December 23, 1955, (*Federal Law Gazette*, p. 817), of December 24, 1956, (*Federal Law Gazette*, p. 1077), and of May 12, 1969, (*Federal Law Gazette*, p. 359).

51. i.e., contributions imposed on persons having suffered no war damage and used to indemnify persons having suffered such damage.

# THE EUROPEAN ECONOMIC COMMUNITY

## Constitutional provisions and administrative arrangements relating to the free movement of goods, services, people and capital

This paper is mainly concerned with the European Economic Community, but it occasionally touches on the other two European communities, the European Coal and Steel Community, and the European Atomic Energy Community (Euratom).

# THE EUROPEAN ECONOMIC COMMUNITY

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# SOURCES AND ACKNOWLEDGEMENTS

The attached notes on the European Economic Community (EEC) were written in February 1981. They are based principally on four sources of written material and on interviews with officials of the Commission of the European Communities carried out in Brussels in May 1980.

## WRITTEN SOURCES

- Wyatt, Derek and Dashwood, Alan, *The Substantive Law of the EEC*, London: Sweet and Maxwell, 1980.

I have drawn heavily on this excellent and up-to-date textbook, with the kind permission of the authors. A few sections of the attached notes, notably those relating to the judicial interpretation of the treaty provisions, are little more than a précis of more detailed material contained in the book. Serious students of the subject should refer to the book itself.

- Publications of the Commission.

The information services of the Commission make available much useful material, both in condensed and more detailed form. The condensed material I have referred to includes the *European File* series and the *European Documentation* series. Other publications consulted, such as the *Thirteenth General Report* of the Commission, are referred to in the notes which follow the text of this paper.

The wording of treaty articles is taken from *Treaties establishing the European Communities*, abridged edition, published by the Office for Official Publications of the European Communities, 1979.

- Publications of Price Waterhouse & Co.

One of the most useful single short guides to the EEC and the treaty provisions regarding free movement is *Doing business in the European Communities*, October, 1978. More detailed information on particular subjects such as company law and taxation is contained in the periodic *EEC Bulletin*, also published by Price Waterhouse.

- Press reports.

The source most frequently referred to was *The Economist* of London, over the period late 1979 to January 1981.

## INTERVIEWS

I should like to express my thanks to all those Commission officials who gave freely of their time, and in particular I should like to thank the following:

Jean-Jacques Beuve Méry
Christopher Cruickshank
Dirk J. Dekker
Dermott John Devine
Leslie Duck
Hans Claudius Ficker
Joseph Gilchrist
Gerhard Hipp
Gérard Imbert
R. Martin
Pierre Ohlmann
John K. Temple Lang
John S. Vigors
Richard Wainwright
Erich Zimmermann

I am grateful also for the help and advice of Gwyn Morgan and Dan Roseman, of the Commission's delegation in Ottawa. John Klassen of the Canadian delegation in Brussels helped arrange the interviews.

John A. Hayes
February, 1981

## A DESCRIPTION OF THE COMMUNITY[1]

The EEC is an attempt by the major European nations to create a barrier-free common market from relatively intractable raw material, albeit with an admirable will to succeed. Because it is a recent attempt, grappling with the latest post-war characteristics of modern economies, it is instructive to observe what treaty, institutional, and consultative arrangements have been put into place to achieve the objectives. While allowance must be made for the occasional excess of enthusiasm on the part of the Commission for harmonizing disparate national legislation, if the Community, being only an embryo federal system, does harmonize or propose to harmonize a given activity, that is sufficient reason for federal systems to take notice, especially those federal systems, such as Canada, that have smaller markets than the EEC. In a broader context, even countries with large markets have to be interested, whether they be federations or not. The trading area embraced by the EEC and the many countries with which it has agreements is so large that some of its common arrangements are bound to influence the world market as a whole. This is particularly true in industrial standards and commercial practices.

The original six members of the Community were Germany, France, Italy, Belgium, Holland and Luxembourg. Britain, Denmark and Ireland joined on January 1, 1973. Greece became a member on January 1, 1981. The total population is now about 270 million. Spain and Portugal may join in about 1984. The free trade area in industrial products includes the European Free Trade Association (EFTA) countries, and there are special commercial treaties with many other countries, including those in the third world.

### THE DEVELOPMENT OF THE EEC

The forerunner of the present EEC and its institutional structures was the European Coal and Steel Community (ECSC), which established a common market in coal and steel products among the original six countries. The Treaty of Paris of April 18, 1951, set up a High Authority independent of governments, a Council of Ministers, a Court of Justice, and a Parliamentary Assembly. The motivation was more political than economic: the desire to prevent, by increasing economic and political integration, a repetition of World War II.

The Treaty of Paris provided for the abolition of import and export duties, of trade practices that interfere with the purchaser's choice of supplier, and of subsidies. The High Authority's powers of intervention in free market forces were limited, but in appropriate circumstances it could fix prices and fine breaches of competition. The ECSC was to be the first stage of a European federalism.[2]

Then followed an attempt to establish a European Defence Community, to integrate armies and provide an acceptable framework for German rearmament. At about the same time, an Ad Hoc Assembly, whose core was the ECSC Assembly, discussed a possible political community. The proposals of the Ad Hoc Assembly that were submitted in March 1953 envisaged the following:

- a common market
- common security
- a common foreign policy
- adherence to a convention on rights and freedoms.

Hopes for early political union were dashed when the French National Assembly in August, 1954 rejected the European Defence Community agreement. In 1955 the six members decided to proceed more cautiously by developing political union indirectly, through increasing economic integration. They commissioned the Spaak Report, submitted in April, 1956. The report recommended a common market and advised that institutional supervision of its operations would be essential, "since it would be impracticable to exhaustively enumerate the procedures and mechanisms required to achieve the desired end."[3]

Two sets of negotiations then proceeded simultaneously: one, among the Six, concluding in the Treaty of Rome, on March 25, 1957; and the other, among seven other European countries, concluding in the EFTA on May 3, 1960. The Rome treaty established the EEC and the European Atomic Energy Community (Euratom). The institutional arrangements paralleled those of the ECSC, and eventually the institutions were merged, e.g., the ECSC High Authority became merged in the EEC Commission.

The United Kingdom was ultimately successful in joining the Community on January 1, 1973, along with Ireland and Denmark. A British government white paper of 1970 noted that "the development and exploitation of modern industrial technology, upon which so much of our employment and income increasingly depends, requires greater resources for research and development and wider markets than any one Western European nation can provide."[4]

Meanwhile, in October, 1972 in Paris, the heads of state or government of the Six had agreed that their aim was European union. In December, 1974 Belgian Prime Minister Leo Tindemans was asked to prepare a report on what was meant by this term. The report was submitted on December 29, 1975.[5] It proposed "a series of measures including a common external policy, an economic and monetary union, European social and regional policies, joint industrial policies as regards growth industries, policies directly affecting Community citizens, and a substantial reinforcement of the Community institutions." The Tindemans report has regularly been on the European Council's agenda, but no direct action has been taken on it.[6] The European Council is the Council of Ministers.

In March, 1979 the European Monetary System came into operation, followed in June by the first direct elections to the European Parliament.

Greece became the 10th member state on January 1, 1981. There are transitional provisions to take effect over a period of years before Greece is fully integrated.

## THE PRINCIPAL FEATURES OF THE EEC

The following paragraphs describe the main objectives and treaty provisions, the institutions, the nature of Community law, and the Community's budget.

### Objectives and treaty provisions

The preamble to the treaty[7] notes that its signatories are "determined to lay the foundations of an ever closer union among the peoples of Europe" and are "resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe." Article 2 of the treaty states that "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it."

Article 3 lists the activities of the Community, which include the following:

- the elimination of barriers between member states to imports and exports of goods, and to the free movement of people, services and capital

- the establishment of a customs union
- the adoption of a common policy in agriculture and transport
- the institution of a system to ensure that competition is not distorted
- co-ordination of economic policies
- "the approximation of the laws of member states to the extent required for the proper functioning of the common market"
- the creation of a Social Fund to assist workers' opportunities
- the establishment of an investment bank
- the association of the overseas countries and territories.

Article 7 provides that "within the scope of application of this treaty . . . any discrimination on grounds of nationality shall be prohibited. The Council may, on a proposal from the Commission and after consulting the Assembly, adopt, by a qualified majority, rules designed to prohibit such discrimination."

A separate treaty established Euratom, to govern co-operation in the development of the peaceful uses of atomic energy, a field in which the Six in 1957 saw that they lagged behind other countries such as the United States and Britain.

## Institutions

Article 4 provides for four institutions: an Assembly (now the European Parliament), a Council of ministers from each member state, a Commission of appointed officials, and a Court of Justice that sits in Luxembourg. Also, "the Council and the Commission shall be assisted by an Economic and Social Committee acting in an advisory capacity."

### • The Council of Ministers

The Council makes most of the Community's important decisions and is the source of Community legislation (described later). Its actions must fall within the scope of the treaties and must, with a few exceptions, be based on proposals made by the Commission. There is one minister from each member state, who changes according to the subject being discussed. Each foreign minister takes his turn at presiding over the Council for six months.

The Council makes its decisions unanimously or by a qualified majority, as provided in the treaties. Each country has a vote weighted according to the size of its population, the total before the entry of Greece being 58 votes: the four large member states have 10 each, Holland and Belgium five each, Denmark and Ireland three each, and

Luxembourg two. A qualified majority requires at least 41 votes and, in some cases, these votes must be cast by at least six member states. The Community budget may be approved by a qualified majority. Any two large member states, such as Germany and France, together can form a blocking minority. In practice, most decisions are unanimous, and, by convention, matters considered by one member state to affect its vital interests can be settled only by unanimous vote.

The custom of arriving at decisions unanimously has advantages, but the decision-making process is slowed down, and unanimity becomes more difficult to achieve as the number of member states increases.

### • The Commission

The Commission is, in constitutional terms, an executive body that makes proposals to the legislature (the Council) to implement and safeguard the operation of the treaties. Its staff is the Community's public service. The Commission had 13 members before the entry of Greece, two from each of the four large member states and one from each of the five smaller ones. The commissioners are appointed by member governments for four-year renewable terms. It has become a convention for the larger member states to appoint someone from an opposition party as well as someone from the government party. A commissioner must be independent: he does not represent the government that appointed him, and may not seek or accept direction from it. The Commission makes decisions by simple majority vote. It is collectively responsible to the European Parliament, responsible in the sense that Parliament can dismiss the Commission, although it cannot dismiss individual commissioners. The Commission's obligation to reply to parliamentary questions gives parliamentarians an important control mechanism. Parliament can also sue the Commission or the Council for failure to fulfil their treaty responsibilities (Article 175).

The Commission is often the ally of Parliament against the Council. The Commission, and to some extent Parliament, have a Community rather than a national constituency.

The Commission, like the Council, tends to avoid majority votes. Recent criticisms are that the Commission should not avoid them and that it should take a tougher stand against the Council. However, it is difficult for an appointed body to confront an elected one, even though for Community purposes the Council is indirectly rather than directly elected.

## • The European Parliament

Parliament became a directly-elected body in 1979. The electoral law applicable is the one in each member state. There were at that time 410 seats, although possibly the number has changed with the entry of Greece. The four largest member states each had an equal number, and the five smaller ones had a number which was weighted slightly in terms of population. The number of seats per million of 1976 population was as follows; the list begins with the least populous member state and ends with the most populous one:

| | Seats | Per million |
|---|---|---|
| Luxembourg | 6 | 16.9 |
| Ireland | 15 | 4.7 |
| Denmark | 16 | 3.2 |
| Belgium | 24 | 2.4 |
| Holland | 25 | 1.8 |
| France | 81 | 1.5 |
| United Kingdom | 81 | 1.4 |
| Italy | 81 | 1.4 |
| Germany | 81 | 1.3 |

However, Parliament is not yet a powerful institution. It has no substantive legislative powers; within limits it may delay action, because the treaty requires the Council of Ministers to seek the opinion of Parliament before taking certain decisions. Its function is to "exercise the advisory and supervisory powers which are conferred upon it by this Treaty" (Article 137). Its advice is given with regard to Commission proposals before they go to Council, and the Commission usually amends its proposals after receiving Parliament's views. Parliament also has certain powers with regard to the EEC's budget, which is discussed later.

The socialists formed the largest group in the Parliament elected in 1979, but they are not the most cohesive, nor do they form a majority. It would be hard to form a durable coalition among the various party groups.

## • The Economic and Social Committee

The Economic and Social Committee provides a source of expert advice on legislative and other proposals. It is drawn from among employers, employees and other groups. Members are appointed by the Council of Ministers acting unanimously. Like members of the Commission, they must act independently rather than on instructions. The committee must be consulted on certain questions, including "free movement of workers, freedom of establishment, freedom to provide services, and all cases where harmonization of provisions laid down by national laws, regulations or administrative action entails amendment of national legislation."[8]

### • The Court of Justice

The Court of Justice is the Community's supreme court, interpreting community law. The principal source of this law is the treaties. The court has nine judges appointed by agreement among the member governments.

> The convention of having one judge from each member country (an established custom, not an immutable rule) ensures that knowledge of each member country's legal system is instantly available. The judges are appointed for six years, and reappointment is the rule rather than the exception. Their decisions are always presented without stating whether the verdict was reached unanimously or by a majority, and their deliberations are secret; so no member government can find out whether its own judge was helping or hindering its case.[9]

"The essential role of the court is to examine the legality of the acts of the Council and Commission, to decide whether a member state has failed to meet its obligations under the Community legislation, and to give a preliminary ruling at the request of a national court of a member state on the interpretation of Community law."[10] Enforcement of Community law is usually effected through national courts.

## Community law

Community law derives from basic and secondary legislation. Basic legislation comprises the treaties,[11] which are, in effect, the Community's constitution. The two most important instruments of secondary legislation are regulations and directives. Conventions concluded by the Council of Ministers with third countries also constitute an integral part of Community law.[12]

Two things should be noted about Community law. One is its primacy over national laws, and the second is that some basic and secondary legislation vests "many individual rights in nationals of the member states. Such rights then form an integral part of the body of national law in each state and private individuals may invoke them if necessary in their national courts."[13]

The courts of some member states claimed several years ago that their respective governments' ratification of the Community treaties was unconstitutional, and some claimed that because the treaties had been ratified by national laws, they could be repealed by subsequent laws. But the Luxembourg Court decided that Community law is essentially constitutional, and "on the basis of analogy with federal systems," the court regarded the law derived from the treaties as taking precedence over national laws even where the latter are of later date or constitutional in nature. The primacy of EEC law embraces both basic and secondary legislation.

The EEC Treaty provides that for specified matters the Council of Ministers shall adopt regulations or directives to elaborate and implement the treaty provisions. Council unanimity is usually required, which slows the process. The Commission may in some cases itself enact regulations, notably in the field of agriculture. As noted earlier, the Council's legislation must nearly always be based on proposals made by the Commission.

Regulations have greater legal consequences than directives in that they are directly applicable in national courts, i.e., they must not be reproduced by national statutory provisions. They also have direct effect, i.e., they create not only obligations between member states but include provisions that bestow a legal right on a natural or legal person as against other persons or a member state. These rights are protected in national courts, and the Luxembourg Court's rulings ensure uniform interpretation throughout the Community.

Directives are addressed to governments of member states and are used for harmonizing legislation or administrative action. They are binding on member states as to the result to be achieved, but choice of method is left to national authorities, e.g., they may use administrative action rather than legislation, as do two member states to implement the directive on government purchasing.

The treaty articles and, less usually, directives may also have direct effect, but this is a question of judicial interpretation by the Luxembourg court. Article 119 has, for example, been held to have direct effect. This article obliges member states to maintain the principle that men and women should receive equal pay for equal work. In the *Defrenne* case the court held that affected individuals may invoke this right in national courts not only against public authorities but in all collective agreements and contracts. The court held, however, that its ruling had only prospective and not retrospective application.[14]

Article 119 was inserted in the treaty principally because France was worried about competition for its textile industry, and not for any particular concern about equal rights for women; but, helped by the article, the Community's record on equal rights in recent years has been good.

## The budget

The budget is expressed in European Units of Account (EUA), each unit being a weighted basket of the currencies of the member states. One EUA was in February 1981 worth somewhat more than one U.S. dollar. The 1981 budget was expected to exceed 20 billion EUAs, equal to rather less than one per cent of the Community's gross domestic product. In 1977 it was equal to 2.4 per cent of the sum of the national budgets of member states; the present proportion may be a bit larger.

The budget is drawn up by the Commission, discussed by Parliament, and ultimately agreed on by Council. The budget may be approved by Council by a qualified majority vote. Parliament may suggest amendments and it may reject the budget as a whole, as it did, for a time, the 1980 budget; in the case of rejection, the Community is held to the previous year's level of spending, at the rate of one-twelfth each month.

Beginning with the 1978 budget in theory, and the 1979 budget in practice, the budget has been financed from the Community's own earmarked revenue sources, that is, without direct contributions from the national budgets of member states. These revenue sources are agricultural and sugar levies (levies on imports under the Common Agricultural Policy (CAP), supplemented by some others such as "co-responsibility" levies on EEC milk producers), all the Community's customs duties, and a portion of each country's value-added tax (VAT).

As long ago as 1970 member states agreed the Community could have, as a revenue source, up to a ceiling of one per cent of the common base for assessing VAT; but it was not until member states had implemented the sixth Council directive on VAT, by incorporating the provisions in their national legislation and thus harmonizing the tax base for levying VAT, that the system could come into effect.

It now looks as though the one-per-cent ceiling will be reached in the 1982 budget, so that either the ceiling will be raised, or new revenue sources allocated (an oil import tax is one suggestion), or the Common Agricultural Policy, which is the "cuckoo in the nest" eating up most of the budget, will have to be revised so as to cut expenditures.

There is, of course, a good deal of dispute among member countries as to whether there is a fair distribution of burdens and benefits within the budget, as well as about the overall economic effects of integration. The member states at the outset rejected the principle of *juste retour*, the notion that each country should get back the equivalent of what it had contributed; but comparisons of contributions and receipts inevitably continue to be made. Because CAP bears heavily on countries that are, on balance, large food importers, the major net contributors to the budget are Germany and Britain, whereas "all the small countries (rich or poor) make a handsome profit."

The Commission in a 1978 report summed up the budget as follows: "The Community budget, not insignificant in absolute terms yet relatively small and very heavily weighted in favour of one policy, reflects the reality of a very partial and extremely localized financial integration. At present, it is neither a true instrument for financing a wide range of policies nor a means of redistribution worthy of the name, nor an instrument of economic stabilization."[15]

Aside from the budget, there are other financial instruments that involve the Community in financial responsibilities, such as the European Investment Bank, and various loan arrangements.

## ELEMENTS OF A FEDERAL SYSTEM

The EEC has some elements of a federal system in its common institutions and budget, the possibility of free movement, notably of goods and people, and the attempt to harmonize economic policies through the European Monetary System and in other ways. The inability of its Parliament to decide where to sit, whether in Brussels, Luxembourg or Strasbourg, is also truly federal. But in other respects the Community is far from being a federal system: the absence of a directly-elected government at the Community level, of a common currency, of a common foreign policy, of common defence forces, of any attempt to harmonize national social security systems and benefits, and the small size of the budget and of income redistribution measures.

## PROSPECTS FOR AN ENLARGED COMMUNITY

Spain and Portugal had hoped to join the EEC on January 1, 1983, but 1984 is more likely. Spain's agriculture and Portugal's surplus workers are problems that need to be resolved. There is no likelihood of Turkey becoming a member in the foreseeable future. A new member may be blocked by any one member state.

# THE INTERNAL FREE MOVEMENT OF GOODS, SERVICES, PEOPLE AND CAPITAL

## SUMMARY

Unlike Canada, the EEC is not a federation. Nevertheless, the EEC is interesting for a number of reasons. First, because it is a modern attempt to establish and ensure free movement, one that takes account of modern problems such as government intervention in the form of aid to, and ownership of, commercial enterprises. Second, because with a weak political framework to ensure free movement, there has to be relatively greater reliance on the legal rules. Since Canada's federal framework has shown some weaknesses in recent years, the EEC experience is clearly relevant. The EEC treaty and other rules regarding free movement impose, in some cases, greater obligations on governments than do comparable Canadian rules. Enforcement is, however, sometimes difficult. Observance of rules relating to free movement in any country or community depends on a proper combination of judicial and political authority. The Community is deficient in the latter.

The problems confronting the promotion of free movement in the Community are formidable, quite apart from those posed by different languages, historical development and culture. There are, at the national level, different legal systems, particularly since the entry of the United Kingdom and Ireland with their common law tradition. There are wide income differences, in the order of a ratio of four to one between the richest and poorest regions, and there is a variety of political systems and approaches to the proper role of government.

To create a common market the Community has no federal government, no single currency, and a relatively tiny budget. There is also the uncertainty for investment and trade that goes with a confederate union: the Labour party in Britain continues to talk about the country withdrawing. However, there has been a political will to compromise and make progress, a strongly-worded treaty, and common institutions to supervise its implementation. Given the immensity of the task, the achievements have been impressive. The responsibility of the Commission to initiate proposals to promote free movement has been a key factor. So also has been the role played by the Community's Court of Justice in Luxembourg. The prodding of the Commission and the court's decisions have pushed the governments of member states towards integration faster than they—being subject to the changing political pressures of the moment from their separate constituencies—would otherwise have gone.

This summary of free movement in the EEC will set out briefly the Community's objectives, what practices are prohibited, what rights are secured, what legislation is harmonized, how harmonization is achieved, and what appears to be the overall result so far.

### The Community's objectives

The objectives, as set out in the preamble and in Article 2 of the EEC Treaty, are to "lay the foundations of an ever closer union among the peoples of Europe" and to promote increased living standards "by establishing a common market and progressively approximating the economic policies of Member States." So far as free movement among member states is concerned, the key activities of the Community listed in Article 3 are

- the elimination of barriers to imports and exports of goods and to the free movement of people, services and capital
- the institution of a system to ensure that competition is not distorted
- the approximation of the laws of member states to the extent required for the proper functioning of the common market.

### Practices that are prohibited

In a number of articles throughout the treaty, discrimination based on country of origin or destination is prohibited. It is, in fact, a general principle, as is apparent from the text of Article 7 and from the judgments of the court. A number of articles also prohibit discrimination within member states among different firms and products. Exceptions are provided for, but there are control mechanisms. The objective is to secure true market conditions, with a minimum of artificial impediments to free movement.

This prohibition of discrimination and of other burdens on free movement is illustrated by the following examples:

- Fiscal charges on trade between member states are prohibited whether or not they are designed to be protectionist. Prohibited charges include, for example, those which would result in some member states having cheaper access than others to raw materials, and internal taxation that discriminates against the trade of other member states.

- Quantitative restrictions and all measures having equivalent effect are prohibited on imports and exports between member states. This includes "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade." There is an exception for restrictions related to such matters as public morality and health, but these must not "constitute a means of arbitrary discrimination or a disguised restriction on trade between member states."

- State monopolies that discriminate against the products of the member states are prohibited. No state monopolies may be given an exclusive right to import, lest they discriminate.

- Public undertakings as well as private entities are subject to Community rules. For example, a government direction to a publicly-owned steel undertaking to give preference to domestic customers in the event of a shortage would be illegal. Article 90(2) provides an exception for certain government service undertakings, such as those involved in transport, but the exception appears to be of narrow scope.

- The prohibition regarding measures having equivalent effect to quantitative restrictions includes discriminatory government purchases, at any level of government. The Community has introduced two directives, which bind member states, "allowing the observance of this prohibition to be better supervised." Small contracts and certain sectors are exempted from the procedures for soliciting and accepting bids laid down in the directives, but, strictly speaking, no contracts should discriminate.

- Transport charges that discriminate on the basis of country of origin or destination are prohibited. Also prohibited, unless authorized by the Commission, are charges that favour particular undertakings or industries.

- Direct investment between member states, including takeovers, must not be prevented on the grounds of nationality.

- State aids can "threaten the very existence of the common market." Those that distort competition among member states are prohibited, subject to exceptions. The important exceptions are supervised by the Commission.

## Rights that are secured

Workers and self-employed persons and their dependants, as well as business firms, have the right to establish themselves in another member state and pursue activities there on the same footing as nationals of that state. Their freedom from discrimination has direct effect so far as Community law is concerned. In other words, it is protected by national courts, and persons may seek, in those courts, a remedy against public authorities or private entities.

In the case of the professions, the right of establishment and the right to provide services across the borders of member states exist, but their exercise needs to be facilitated by the implementing action of national authorities, such as agreement on the mutual recognition of diplomas. However, for this group, as for others, discrimination on the basis of nationality is prohibited, e.g., if an architect has the qualifications to join a national association he must be permitted to regardless of his nationality.

Other examples of the rights of people who are nationals of member states follow.

- The Council and the Commission are required to enable a national of one member state to acquire and use land and buildings situated in the territory of another member state, subject to restrictions related to the common agricultural policy.

- A worker from another member state may not be treated differently in respect of any conditions of employment and work, in particular as regards pay and dismissal, and should he or she become unemployed, in respect of reinstatement or re-employment. Migrant workers must also be given the same social and tax advantages as national workers, whether or not these advantages pertain to the contract of employment.

- A migrant worker's children have access to general educational, apprenticeship and vocational training courses under the same conditions as nationals of that state. Children are educated in the language of the host country but, by virtue of a 1977 directive, should have the option of tuition in their original language and culture.

- As to social security benefits, a 1971 Council regulation ensures for Community migrants and dependants the same treatment as nationals of the host state, aggregation of their payments made in different member states, and payment to them, while they are resident in one member state, of benefits from another where they have earned such benefits.

- The court has ruled that men and women are to receive equal pay for equal work, and this decision is progressively being implemented. Equal treatment by the social security system is to be implemented by 1984.

### Legislation that is being harmonized

For many matters, the treaty requires member states to bring into line their legislation, administrative practices and policies. The Common Agricultural Policy (CAP) is one example. Others are measures to abolish restrictions on the freedom of establishment and the harmonizing of economic policies and indirect taxes. A number of matters are not mentioned in the treaty, such as protection of consumers and of the environment, but the Community has followed the logic of the treaty's objectives in harmonizing in these areas too. For example, new firms must satisfy environmental requirements without financial help from government. Also, the Council has decided that education is inseparable from the Commission's task, given to it by the treaty, of promoting close co-operation in vocational training and employment. Article 235 is a general power that allows the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to take appropriate measures to achieve Community objectives in cases where the treaty has not provided the necessary powers.

Where there is an escape clause, such as Article 36, which covers restrictions on imports related to public health, morality and other matters, there is an attempt to harmonize those measures of member states that may pass the strict legal test of the escape provisions, but that nevertheless pose a threat to Community trade. Thus, there are numerous directives relating to "technical barriers to trade." For example, the safety features of automobiles are standardized.

There is also an attempt to harmonize matters that are not regulated by governments, such as voluntary industrial standards.

What is not harmonized? Where does one draw the line? Commission officials say that measures with only indirect effects on competition and Community trade are not harmonized. For example, in the past an Italian may have found it easier to get a divorce in Germany and may have been inclined to change his domicile for that reason, but no attempt was made to harmonize divorce laws. On the other hand, there are measures that clearly affect manufacturers' costs, such as in the area of product liability, where a defect in a product could result in injury to the user. In Italy, the user must prove negligence on the part of the manufacturer. In France, the manufacturer is liable whether negligent or not; he must insure himself, and this adds to his costs. This difference has a direct effect on trade and competition, so the Commission will seek uniform national policies. However, it is evident that the line between direct and indirect effects is bound to be indistinct.

## How harmonization is typically brought about

There are various mechanisms to promote harmonization and some of them are listed in Article 189. One of the most important and frequently used mechanisms is the directive. Typically, the Commission makes a proposal that is examined by the Parliament, and by the Economic and Social Council representing expert interests, and is then adopted unanimously by the Council of Ministers. "A Directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods." For example, national authorities may choose to give effect to an agreement of the Council about public purchasing policy either by legislation or by executive regulations.

Once a directive has been adopted a member state may not adopt measures different from those covered by the directive applying to the same matters. At least, this is the implication of a court decision concerning a directive in the field of health protection. A member state's only proper recourse would be to get the directive changed through an amendment by Council.

One problem with directives is that it take years to get them adopted; another is that the Commission is obliged to spend much of its time supervising and adapting old directives rather than drawing up new ones to cope with unsolved problems.

## The results so far

Is there a common market, and free movement of goods, services, capital and people?

### • Goods

While much has been achieved in the area of free movement of goods, the establishment of a single market is still hindered by various factors. There are different and fluctuating currencies. Also, "fiscal frontiers" are still made necessary because of differences among member states in the rates of value-added tax (VAT) and excise tax that they apply to various products. Travellers are given a tax-free allowance similar to a duty-free allowance.

For such products as cars there are major price differences among member states due to exclusive dealerships and varying mark-ups, as well as due to VAT. The Belgian branch of BMW was fined by the Commission recently for trying to prevent its dealers from selling cars to customers in Germany where higher prices were maintained by dealers. The Commission's fines may be reviewed on appeal to the court, but the court continually upholds the principle that the possibility of so-called parallel imports must be preserved, i.e., no one may prevent the importation of goods from the low price country into the high price country, in a situation where dual pricing is being practised by a manufacturer. Differences in prices also arise from the fact that in some areas the Community has not yet completed a common commercial policy vis-à-vis third countries. For example, with government blessing, manufacturers in individual member states make separate arrangements with the Japanese to restrict shipments of Japanese television sets.

In agriculture, the commonly-agreed prices are converted into national currencies not at current rates of exchange but at so-called green currency rates, to insulate farmers or, as the case may be, consumers from unwelcome currency movements. This has led to quite large differences in prices between member states, at true rates of exchange.

Some government purchasing still favours domestic goods and services because the procedures prescribed in the directives may be circumvented in practice if not in form. State aids to state-controlled enterprises are not sufficiently transparent and may evade supervision by the Commission. State aids to sectors in trouble have, since the recent recession, been given a fairly liberal dispensation by the Commission from the usual rules.

The treaty's reach over interstate commerce has been widely interpreted, but not as widely as in the United States. The regulatory power of member states is still extensive. Thus, technical barriers to trade, arising from different requirements and standards related to health and safety, are still an impediment. Although many have been harmonized, many remain.

- **Services**

Services are frequently performed locally, and domestic providers of services usually have important advantages. Some steps have been taken to facilitate the provision of services by credit institutions, insurance companies, transport undertakings and professionals established in other member states, but progress is bound to be slow. One major task is the creation of an EEC commercial legal environment, to facilitate the conclusion of commercial contracts.

- **Capital**

Because the Community is not yet a monetary union, foreign exchange restrictions are allowed in certain circumstances, and are still maintained as a more or less permanent feature by some member states. The less volatile transactions that are not generally involved in speculative currency movements have, however, been liberalized by all states.

There are gaps in the harmonization of company and securities laws that hinder investment. Investment is also hindered by the uncertainty inherent in any union that lacks a common currency, and by the more fragile political structure of a confederation compared with a federation.

While direct investment should not be discriminated against on grounds of nationality, there are, in fact, national sensitivities, especially towards takeovers, and these are usually respected.

Huge locational incentives are given to industry by different member states. Their level is supervised by the Commission.

- **People**

The achievements regarding the free movement of people, in the absence of a common citizenship, are truly impressive. The fact that many rights have direct effect and are thus protected by national courts is important. The professions represent one area where there are still major problems, but there has been a breakthrough in the medical field: there is a reciprocal recognition of diplomas for doctors, nurses, dentists, veterinarians and midwives.

Member states recently agreed that students should have equal access to university places throughout the Community, although no doubt that will take time to implement. Meanwhile, Britain has agreed that EEC students should pay fees no higher than those paid by British students, which are lower than those paid by overseas students.

From 1983 national driving licences of all member states will be exchangeable without a test, and by 1986 all states will issue new drivers with a common Community licence. The prospects for a common Community passport are said to be good.

## GOODS AND SERVICES

### Treaty provisions and their interpretation: goods[16]

Title 1 of Part Two of the EEC Treaty, embracing Articles 9 to 37, is entirely devoted to "Free movement of goods." As noted below, other articles are also relevant.

The guarantee of free movement expressed in key articles such as 12 and 30 has been broadly interpreted by the Luxembourg court, and escape clauses, such as Article 36, have been narrowly interpreted. It is well known that the much-litigated free trade guarantee in section 92 of Australia's Constitution has greatly restricted the scope for certain legislation by Australian states, and yet in one respect the Article 30 guarantee is more burdensome on the EEC states, even though the EEC is not a federation.[17] The court held that in some cases a maximum retail price, although fixed at the same level for both domestic and imported goods, could in fact discriminate against imports and infringe the guarantee.

The court has also decided that where fiscal charges result in some member states having cheaper access to raw materials than others, there is incompatibility with Article 3(f), which states the objective that competition in the common market not be distorted.[18]

The following paragraphs will describe the treaty provisions that relate to three of the possible sources of interference with free movement:

- customs duties and discriminatory internal taxation
- quantitative restrictions and measures having equivalent effect, including the regulatory powers allowed under Article 36
- state monopolies of a commercial character.

There is a fourth source: protective measures to safeguard the balance of payments. But, since Canada has a monetary union, the relevant EEC treaty provisions are only of passing interest and will not be examined here.[19]

The difference between the first two sources listed above, fiscal charges and quantitative restrictions, is mainly of historical interest, because their effects as barriers are similar, but there are separate treaty articles for the two categories and therefore separate jurisprudence. It should be noted that the protection for free movement that these articles provide applies not only to goods that originate in member states but also to "products coming from third countries which are in free circulation in member states" (Article 9(2)). Free circulation means, in effect, goods that have cleared customs.

- **Customs duties and discriminatory internal taxation**

These sources of barriers are covered by Articles 9 to 17 and 95 to 99. Article 12 is a key article:

> Member states shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

Article 95 rather than Article 12 applies to fiscal charges forming part of a system of internal taxation (see below).

The court has made it clear in relation to Article 12 and its companion articles (such as 9 and 13) that "the achievement of a single market between member states requires more than the elimination of protection". Thus, "any pecuniary charge . . . which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier . . . constitutes a charge having equivalent effect . . . even if it is not imposed for the benefit of the state, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product."[20]

The court struck down a charge levied by Belgium on imported raw diamonds, the proceeds of which were to provide social security benefits for workers in the diamond industry. The court would, however, in special cases allow inspection fees that are not discriminatory, are related to the cost of providing the service, and do not circumvent the treaty.

Article 95 prohibits *discriminatory internal taxation* on imported goods, and this rule "constitutes an essential basic principle of the common market." The first paragraph of Article 95 prohibits "any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products." By "indirectly" is meant taxation on raw materials or component parts making up the product. The second paragraph extends the prohibition to taxation that affords indirect protection to other products.

Despite the difficulty that Article 95 occasionally gives for judicial interpretation, the Luxembourg Court has held that the article has direct effect, that is, it should be enforced by national courts, without any action being required by the institutions of the Community or the member states for its implementation. "Although this provision involves the evaluation of economic factors," observed the court, "this does not exclude the right and duty of national courts to ensure that the rules of the treaty are observed whenever they can ascertain . . . that the conditions necessary for the application of the article are fulfilled."[21]

When an article is held to have direct effect, the protection afforded by it is not subject to being delayed and possibly diluted by the lengthy and laborious processes of Community secondary legislation, such as the drawing up of a Council directive requiring unanimous consent.

So far as exports are concerned, Article 12 prohibits a tax, Article 34 prohibits quantitative restrictions, and Article 96 prohibits any incentive to exports that might arise through an excessive refund of the internal taxation imposed on the product.

### • Quantitative restrictions and measures having equivalent effect

At the time of the Rome Treaty, quantitative restrictions were a major impediment to trade between member states. Articles 30 to 36 provide for the elimination of these restrictions on both imports and exports. Article 30 applies to imports, Article 34 to exports, and Article 36 is an escape clause. Article 30 reads as follows:

> Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between member states.

The words "following provisions" refer to the transitional arrangements, now expired, to Article 36, and to the special provisions relating to state monopolies discussed below.

The court has broadly defined "measures having equivalent effect" as "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[22] The court has also applied sophisticated rather than simple tests of discrimination to determine whether foreign goods are being placed at a disadvantage.

One simple test of discrimination is whether foreign goods are being subjected to different measures. Here, the court has prohibited measures such as the following:

- health inspection of plant products at national frontiers, where similar domestic products were not subject to such inspection

- national measures requiring import and export licences in Community trade, even though such licences are granted automatically

- quality controls on exports to other member states.

In a more sophisticated vein, the court has held that identical measures applied to both foreign and domestic goods may in fact place a heavier burden on foreign goods. One case involved the imposition by a member state of maximum retail prices for sugar. However, it would be possible for a state to impose a more general system of price controls, such as one to deal with the general economic situation, without running afoul of Article 30. It could do this under the "reserved powers" qualification to Article 30, under which the court allows measures that hinder trade "but which are specifically referred to elsewhere in the treaty, in particular as fiscal measures, or are *per se* permitted as being the visible or hidden expression of powers retained by the member states." In exercising such reserved powers, a state would have to take account of at least one important restriction, and that is that measures hindering trade must not be out of proportion to their purpose. They must not be used where the same end could be achieved by means less restrictive of intra-Community trade.[23]

As with fiscal charges (see above) the court has struck down, in relation to Article 30, measures that have no protective purpose or effect. These include measures which favour particular trade channels, such as direct imports from third countries rather than imports through a member state, and particular importers.[24]

A further example of the reach of Articles 30 and 34 is that even the arrangements for marketing under the Common Agricultural Policy (CAP) must take account of them. Article 40 allows the Council of

Ministers to derogate from the free movement provisions of the treaty in order to attain the objectives of CAP set out in Article 39, but the common organization of agricultural markets may derogate only "in exceptional circumstances."[25] Article 40(3) says that the common organization "shall exclude any discrimination between producers or consumers within the Community."

Article 36 is the principal escape clause: its purpose and scope may be compared with the "police power" of the American states. It reads as follows:

> The provisions of Articles 30 to 34 shall not preclude prohibition or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

"While Article 36 may permit measures which have a discriminatory effect, such discrimination must not be arbitrary, as is stated explicitly in the Article in question, nor must measures taken on the basis of the article burden trade to a greater extent than is strictly necessary to achieve the desired end."[26]

Despite these strictures, a good number of measures have passed the test of Article 36. If they are then not to prove a barrier to trade they need to be harmonized with the measures taken by the other member states, and this is done by Community directives. Most such measures are, in Community parlance, called technical barriers to trade, and many arise through the adoption of standards for food and industrial products.[27] Some member states have been extraordinarily inventive. For example, the Italian authorities required refrigerator doors sold in Italy to be thicker than in other states on the grounds that the climate was warmer. As of June 1979 about 180 directives relating to technical barriers had been adopted, and another 60 were awaiting approval. But it takes little to create a barrier, and major efforts (directives require unanimity) to remove one. The Commission's work "is similar to emptying a bathtub with a teaspoon while the taps are full on."[28]

The Commission has been encouraged by the court's decision in the recent *cassis de Dijon* case. The court appears to have narrowed substantially the scope of the Article 36 exemption by ruling that if a product meets the legal requirements of the member state of manufacture it should be accepted by other states unless there is an "imperative reason."[29] If the Commission's hopes are not misplaced there will need to be fewer attempts at harmonizing member states' legislation by the laborious mechanism of unanimously-approved directives.

One final cause of barriers may be noted under the heading of quantitative restrictions and measures having equivalent effect. The Community has not yet fully adopted a common commercial policy vis-à-vis third countries. Consequently, a few instances survive where "a product may be imported freely into one state from a third country, but be denied access to another." Bananas imported from Central America seem to be one example (see section on agriculture below). In these circumstances, "the Commission may authorize a member state to take protective measures against a product in free circulation in another state."[30]

### • State monopolies of a commercial character

These monopolies, which in Canada would include the provincial liquor boards, are the subject of a special article in the Rome Treaty, Article 37. The purpose of the article was two-fold: first, to soften the effect of the other articles on the politically-sensitive state monopolies during the transition period, which expired at the end of 1969, and second, to provide for a continuing prohibition against trade barriers to goods (not services) arising from this distinctive source. Thus, paragraph (1) of Article 37 provides for the progressive adjustment of state monopolies so as to eliminate discrimination, and paragraph (2) prevents the introduction of new monopolies that involve discrimination. Article 37 reads in part:

> (1) Member states shall progressively adjust any state monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of member states.
>
> The provisions of this article shall apply to any body through which a member state, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between member states. These provisions shall likewise apply to monopolies delegated by the state to others.

(2) Member states shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the abolition of customs duties and quantitative restrictions between member states.

It is not state monopolies *per se* that are prohibited but those that involve unacceptable forms of discrimination. At the time the Community was enlarged in 1973, it was the Commission's view that certain monopolies had not yet been adjusted by the original member states to conform with paragraph (1). These included the French monopolies for alcohol, manufactured tobacco and petroleum, and the Italian monopolies for matches and manufactured tobacco. The French petroleum monopoly is based simply on the allocation of import licences to private undertakings.[31] Import licences for intra-Community trade are normally prohibited.

In a 1976 decision the court interpreted Article 37(1) to mean that, as from the end of the transition period, December 31, 1969, no national monopoly of a commercial character could be given the exclusive right to import from other member states. The reasoning essentially was that when such a right exists the abolition of discrimination cannot be ensured—the word "ensure" is in Article 37(1). Also, there is the potential for discrimination; since Article 30 had been held to embrace rules whose effect on trade was merely potential, the court thought it logical that a parallel interpretation should apply to Article 37.[32]

It is the opinion of Wyatt and Dashwood that the liberal interpretation given by the court to the preceding articles, such as 30 and 34, has significantly reduced the practical effect of Article 37.[33]

## Treaty provisions and their interpretation: services

Services for remuneration may be provided by both individuals and firms. Each group will be considered in turn, focusing on the question of whether they are placed at a disadvantage when providing services in "foreign" jurisdictions.

### • Individuals

In Canada, the province of residence is determined in a more casual way than in the federations of Germany and Switzerland, where changes of residence must be registered with provincial authorities. Within the Community the difference from Canadian practice is even more marked because there are the distinctions that go with being a citizen of a different country. Given the extent of these distinctions in the 1950s, the EEC Treaty devotes a whole chapter (Articles 52 to 58) to the "right of establishment," which is equivalent to the right in a federation to settle in another province and carry on economic activities there as a self-employed person or entrepreneur. Workers are provided for in other articles.

The articles relating to the right of establishment protect those who settle in another state from discrimination. For example, Article 52 speaks of "the right to take up and pursue activities . . . under the conditions laid down for its own nationals by the law of the country where such establishment is effected."[34] Thus, a person *established* in a foreign member state and providing services therein is, legally, able to do so without being discriminated against on the grounds that he comes from another state.

Services may also be provided across borders, by persons established in one member state to someone established in another. Chapter 3 of the treaty (Articles 59 to 66) covers such a situation. The chapter does not, however, apply to services that fall under certain other treaty articles, such as transport services, and banking and insurance services that are connected with the movement of capital (see Article 61).

Article 59 calls for the progressive abolition of restrictions on freedom to provide services across borders within the Community. Since the end of the transition period, discrimination on grounds of nationality or residence has been forbidden.

Thus, whether services are provided by a foreign national within the member state or across a national border, the treaty prohibits discrimination. While there are occasionally differences, the types of discrimination tend to be the same, and indeed the distinction made by the treaty between the right of establishment and the freedom to provide services has been criticized.[35] The following list gives examples of practices that can lead to discrimination and that are discouraged by the Community:[36]

Restricting *access* to a non-wage earning activity by

- requiring authorization, or the issuance of a document
- making it more costly, such as by requiring a security bond
- limiting the right to be a shareholder or director of a company.

Restricting the *exercise* of such an activity by preventing a person from

- entering into certain kinds of transactions, such as a lease
- tendering for public contracts
- borrowing
- benefiting from state aids.

The court has, in fact, held that the discrimination rights implicit in the key Articles 52 and 59 have direct effect and require no implementation by Community institutions and member states other than action to *facilitate the exercise* of those rights. Individuals may, therefore, have reccurse to national courts for their enforcement. Action to facilitate the exercise of rights is not necessary in all cases but it is evidently sometimes necessary in the field of professional qualifications. A later section of this paper describes the progress that has been made. The court has also ruled against disguised as well as direct discrimination.[37]

One interesting case where the court did allow discrimination concerned the question of whether the rules of the Italian Football Federation could legitimately exclude foreign players. The court ruled that while the treaty protected nationals of a member state regarding free movement and provision of services, it did not, in this particular instance, prevent rules adopted for reasons that were not of an economic nature: "The practice of sport is subject to Community law only insofar as it constitutes an economic activity within Article 2 of the treaty."[38] Wyatt and Dashwood add the following comment:

> The true explanation of the Court's reasoning is that Article 7 of the treaty prohibits differentiation on grounds of nationality where to permit it would hinder the creation of a single market between member states and the achievement of an 'ever closer union among the peoples of Europe"; it does not prohibit such differentiation on non-economic grounds in furtherance of interests consistent with the object and purpose of the treaty.[39]

The terms "hinder," "non-economic," and "consistent with" are clearly open to different interpretations, but, in the Community, cultural matters are left entirely to the laws of member states,[40] so that the question of making such distinctions is, as a practical matter, less difficult than in federations, where the national government usually has some legislative responsibilities in the field of culture.

### • Companies and firms

"Companies and firms" means entities—whether incorporated or not—that, for example, have the legal capacity to sue and be sued.

Excluded are non-profit undertakings unconnected with the economic objectives of the treaty (Article 58).

The general rule is that companies are to be treated the same as individuals who are nationals of member states (Article 58), but the test of whether a company qualifies for the right of establishment, and, therefore, for the right to provide services within that member state and across Community borders, is of course more difficult to apply. The question is complicated by the way the different national legal systems in the Community bear on the matter, and by the fact that member states have not ratified the 1968 Convention on the Mutual Recognition of Companies and Legal Persons.[41]

### Treaty provisions and their interpretation: public undertakings[42]

Commercial undertakings which are state-controlled, or which are privately-controlled but exempted for some public purpose from the full rigours of competition, can create problems in a common market situation. The undertakings in one state or province are sometimes enabled to compete on unequal terms regarding the provision of goods or services with enterprises in the same or in another political jurisdiction. The EEC treaty contains, in addition to Article 37, which covers state monopolies in goods (see above), a special Article 90 that covers the type of situation referred to here. For example, the Canadian Broadcasting Corporation (CBC) would be a public undertaking within the meaning of Article 90. (While the CBC's objectives are not economic, it does engage in economic activity, as when it buys programs, hires staff, and sells advertising space.)

Thus, while Article 222 of the EEC Treaty allows member states to decide individually on their own system of property ownership, Article 90 is designed "to close what might otherwise have proved to be a dangerous loophole in the fundamental system envisaged by the treaty." Although "authoritative guidance from the European Court is still scanty," it is the view of Wyatt and Dashwood that the article's effect is to limit strictly any derogations by public undertakings from the general rules of Community law.[43]

Article 90 has three paragraphs and each will be considered in turn: the general obligation imposed on member states, the qualification regarding "the operation of services of general economic interest," and the supervisory role of the Commission.

- **The general obligation imposed on member states**

This obligation is contained in the first paragraph:

> (1) In the case of public undertakings and undertakings to which member states grant special or exclusive rights, member states shall neither enact nor maintain in force any measure contrary to the rules contained in this treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

Article 7 prohibits discrimination on the grounds of nationality; Articles 85 to 91 cover the rules on competition, and Articles 92 to 94 cover state aids.

The first paragraph of Article 90 applies first to public undertakings. In deciding what constitutes a public—as distinct from a private—undertaking, the Commission and other commentators regard as crucial whether the state exercises a preponderant influence over the undertaking's decisions. "It will be a public undertaking if the State . . . is in a position to dictate policy."[44]

It is worth noting that "a direction to a publicly-owned steel undertaking to give preference to domestic customers in the event of a shortage would be readily identifiable as a measure contrary to Article 34 (prohibition of quantitative restrictions on exports, and measures having equivalent effect)."[45]

Article 90(1) applies secondly to undertakings, whether public or private, to which member states grant special or exclusive rights. "The rationale behind the category is the fact that the state has deliberately intervened to relieve the undertaking concerned either wholly or partially from the discipline of competition, and must bear responsibility for the consequences." Examples of private undertakings in this category would be the commercial television companies in the United Kingdom.[46]

In the view of the Commission (not yet endorsed or rejected by the court) "responsibility under Article 90(1) does not presuppose positive action by the member state itself: it suffices merely that a public undertaking or an undertaking granted special or exclusive rights has been guilty of conduct which, on the part of the state, would have involved a treaty violation."[47]

- **The operation of services of general economic interest**

The qualification regarding this function is contained in the second paragraph of Article 90:

> (2) Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular task assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

There are two categories here: entrusted undertakings and revenue-producing monopolies. The way that Article 90(2) has been interpreted means revenue-producing monopolies are mostly covered by Article 37, so that the important category is that of entrusted undertakings. Wyatt and Dashwood point out that in Britain entrusted undertakings might include British Rail, British Airways, the regional electricity boards, and the BBC, but not nationalized industries engaged solely in producing goods rather than in operating a regular service.

The word "obstruct" as used in the article has been construed in such a way that the normal treaty rules apply to an entrusted undertaking unless the observation of the rules "makes the performance of the task allotted to the undertaking impossible and not simply more difficult. Such a test will rarely be satisfied." However, it may be that operating subsidies essential to the continuation of a service would satisfy the test.[48]

Article 90(2) does not relieve member states of procedural obligations, such as the duty of giving to the Commission notice of new or revised aids to entrusted undertakings under Article 93(3), except in unusual circumstances.[49]

- **The supervisory role of the Commission**

This is laid down in paragraph 3 of Article 90:

> (3) The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

The Commission may, under this provision, address to the states legally-binding communications, and it may take preventive as well as remedial action. In these respects the authority given the Commission is both more effective and more flexible[50] than its general supervisory authority under Article 169, which reads as follows:

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

The Commission was preparing in 1979 a draft directive seeking greater transparency in the financial relations between member states and public undertakings.[51]

## SUBJECTS OF PARTICULAR INTEREST

### Advertising

Advertising is a service that is subject to the usual treaty provisions. However, advertising needs to be controlled by national authorities. One interesting case involved an attempt by the French-speaking arm of Belgium's government-operated TV network, which carries no advertising, to enforce a national law requiring foreign programs to delete advertising when broadcasting into Belgium via cable. The Belgian court sought an opinion from the EEC Court in Luxembourg whether enforcement of the law would infringe on the free movement provisions of the treaty. The EEC Court held in March 1980 that enforcement would not infringe the treaty.

On the other hand, some advertising regulations have been held to contravene the treaty. The court has ruled that "French laws which ban all advertising of whisky and gin, but not of cognac, are unfair. When challenged, the French had argued that since whisky and gin are drunk as aperitifs, on an empty stomach, they are dangerous, whereas cognac, drunk after the meal as a digestif, is safe."[52]

### Agriculture, including the Common Agricultural Policy and "green currency" rates

"The agricultural common market is undoubtedly the area in which Europe has made its greatest strides towards integration."[53] Spending on agriculture regularly accounts for between two-thirds and three-quarters of the Community's budget and for over 90 per cent of the

Community's secondary legislation. All this derives from CAP, which involves among other things annual political negotiations to fix farm prices. In March 1980 these negotiations resulted in French farmers hanging British Prime Minister Margaret Thatcher in effigy.

Agriculture is always a problem in international commercial policy negotiations. France would not accept a common market that excluded agriculture, so the Community adopted a common agricultural policy.

Article 39 lists the five basic objectives of CAP:

- to increase productivity
- to ensure fair incomes for farmers
- to stabilize markets
- to ensure supplies
- to ensure reasonable consumer prices.

Except for the last objective, the record has been good. The number of agricultural workers has been cut in half since 1960, indicating the scope of adjustment. However, prices are typically two to three times the world level; butter is four times. And huge surpluses are dumped on world markets to the annoyance of other suppliers.

To meet the objectives of CAP, "various markets for farm produce have been progressively organized, based on three fundamental principles: the single market, Community preference, and joint financial responsibility."

The term *single market* implies "total trade liberalization," within the EEC, including "the harmonization of administrative, health and veterinary regulations." It also implies common prices and identical competition rules.[54]

There are four main types of market organization. The most important type covers about 72 per cent of EEC farm production. It is a system of support prices, common throughout the Community; it usually involves the Community buying and storing produce when prices fall below the support level. There are variable levies on cheap imports throughout the year. The second most important type covers about 25 per cent of production. It offers protection against cheap imports through *seasonal* measures such as import levies. In the case of both types of market organization, countries outside the Community, except in the case of special quota arrangements, are reduced to supplying in any given year only the residual needs of the Community. This is what is meant by *Community preference. Joint financial responsibility* means that CAP is financed through the Community's budget.

There is CAP structural assistance for farmers as well as price support and market protection, but it is relatively small. The governments of member states provide much more money for this purpose directly from their own budgets.

Once a common organization of the market has been established for an agricultural product, national marketing associations must not jeopardize it, and they appear to become fully subject to the competition rules of Article 85(1).[55]

There are various problems with CAP. These include currency fluctuations within the EEC, states that break the rules, surpluses, and the cost of CAP generally.

We will first deal with currency fluctuations. In 1969 the French franc was devalued. This would normally have increased food prices to consumers, but that would have been unacceptable to the French government. Shortly afterwards the German government preferred not to reduce prices to its farmers as the result of a revaluation of the mark. Member states, therefore, introduced so-called "green currency rates," which are different from market rates, to convert the annually-agreed common agricultural prices, expressed in European units of account, into national currencies. These green currency rates are decided upon by governments according to the political pressures of the moment. The result: there is no longer a single market. Although the agreed prices in European units of account are uniform, the equivalent in national currencies at market rates can be quite different. In 1977 there was a disparity of 40 per cent in British and German prices.[56] Since the European Monetary System (see later section of this paper) was introduced in 1979, the disparities have narrowed considerably.

To stop people from buying low in one state and selling high in another, the Community introduced as a "temporary" measure the device of "monetary compensatory amounts." These work in the following way: if a state chooses to insulate its farmers from a rise in the value of its currency to the extent of 10 per cent,[57] an import tax of 10 per cent will be levied on farm produce imports from all sources, whether EEC or other, and a 10 per cent subsidy will be applied to any exports. The Community receives the proceeds of the import tax and pays the subsidy. The member state's citizens will lose on balance (will make a net contribution to the Community) if its agricultural imports exceed its exports.

While the European Monetary System, which has reduced currency fluctuations, has alleviated the green currency problem, the Community is unhappy with the system because of the distortions it creates and its cost to the Community—over a billion dollars a year.

The second problem with CAP is that there are states that break the rules. Roy Jenkins, former chairman of the Commission, was led in 1980 to wonder whether there had been "a general decision to break the rules" in France. In late 1979 the Luxembourg Court condemned French import restrictions on British lamb. The lamb war was eventually resolved by the adoption of an "uncommon" policy: consumer prices in Britain were to be much lower than in France.

The third problem is surpluses. Various correctives are being applied and proposed. If support prices are lowered, the smaller farmers are likely to suffer; and direct income supports to help them, which are now illegal except in special situations, could be an administrative nightmare.

The fourth problem is the cost of CAP, not only the cost of surpluses and other Community budgetary expenditures, but also the high cost to consumers. A major political problem for the Community is the different effect that CAP has on the various states.

The main pressure now for a major revision of CAP is on the revenue side of the Community's budget: the one-per-cent ceiling on VAT revenues is likely to be reached in 1982.

### Banking and insurance

Article 61(2) states that "the liberalization of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalization of movement of capital." Not all banking and insurance services are connected with movements of capital (for example, certain types of risk insurance are, it may be argued, simply payment for a service,)[58] and these other services are subject to the normal free movement guarantees of the treaty. However, in fact there has been a significant liberalization of capital movements (see later section on capital).

The Commission's staff says it has made good progress in facilitating the right of establishment of bank and insurance branches. Which state is responsible for protection of depositors and policyholders is a major question.

As to banking, Directive 77/780 on credit institutions provides in part that a branch opened in another state shall abide by the laws of that state but that the branch shall not be refused permission to commence business solely on the grounds that its head office is located in the "foreign" state. There are proposed directives on deposit insurance, the exchange of credit information, bank advertising, and so on.[59]

For insurance, Commission officials say that "there is complete freedom of establishment and [they] are trying to get freedom for services." Freedom of establishment is secured by Directives 73/239 relating to direct insurance other than life insurance[60] and 79/267 for direct life insurance. The directives provide for supervision of a branch by the state in which the head office is located, but the risks must be carried in accordance with the laws of the state in which the insurance is written. The supervision provision is regarded as an important advance by Commission officials. Branches now have a "margin of solvency" supervised by the head office country, so that the main financial obligation is supervised by only one authority. This is supplemented by an exchange of information among the supervisory authorities of member states. Previously, a company had to fulfil the solvency requirements of the country in which the insurance was written, by depositing a sum of money with the authorities.

A first step to securing freedom of trans-border services is the directive on co-insurance: a risk in one state can be covered in another by this means. In May 1980 a draft directive was before the Council of Ministers that would give complete freedom to provide insurance services across member state boundaries. It was hoped there would be early approval. There is also a directive covering harmonization of civil liability regarding motor vehicles, and several proposed directives including one on the harmonization of laws relating to insurance contracts.[61]

Curiously, for insurance companies there has been more progress on the right of establishment than on facilitating the right to provide services across national boundaries: the reverse of the situation for lawyers. No doubt physical and financial presence is necessary to engender the confidence of the host state.

## Energy[62]

The Community imports, mostly in the form of oil, about half the energy it consumes, and since the onset of the energy crisis in 1973 there have been attempts to forge a common energy policy. There is no overall independent source of authority in the treaties. The ECSC Treaty covers coal. The Euratom Treaty creates a single market for nuclear fuel, although member states still tend to negotiate separately with foreign uranium suppliers. Production and distribution of energy sources in primary form, such as petroleum and natural gas, are governed by the general provisions of the treaties; but governments are involved directly and indirectly in many activities affecting the energy market. These include the British government's control and part ownership of Britain's North Sea oil, the French government's oil import licensing system, the licensing of nuclear plants, public utilities, taxation policies and industrial standards.

Commission publications express the need for a common strategy in the following terms.

- The member states have common economic and social objectives, and these goals are increasingly conditioned by the supply of energy.
- Given the insecurity of supplies, the Community must adopt a policy of diversification and this requires a common strategy.
- "Measures taken by Member States—adoption of norms, investment aid, etc.—could, if not suitably harmonized, hinder the free movement of goods within the Common Market or cause a distortion of competition. Different obligatory fuel-consumption norms are applied in Europe, and these tend to segregate the large market which the car industry needs for expansion."

The Council of Ministers did, in fact, outline the main objectives of a common energy policy in December 1976. Some specific measures were subsequently adopted by the Council. They include three directives of an obligatory nature, in 1978 and 1979, dealing with the performance of appliances for hot water and heating buildings, and with the presentation of energy consumption information on household appliances.

The Commission has made other proposals, such as the harmonization of oil prices and taxes, the adoption of obligatory construction standards for new buildings and the provision of financial aid for the modification of existing buildings.

## Fish

In 1980 there were vigorous attempts by member states to reach agreement on a common fishing policy. In October, agreement was reached on conservation rules and enforcement measures, but as of December 31, the target date, no agreement had been reached on the more difficult questions of access to fishing areas and the allocation of quotas. Britain is the key country since its waters contain about two-thirds of EEC fish. When an agreement is reached it will be policed by Commission inspectors.

## Government purchasing preferences

Article 30, as mentioned earlier, prohibits quantitative restrictions on imports and all measures having equivalent effect. This covers government purchases, at any level of government, from other member states, as well as non-government purchases. It has been noted that Article 90, relating to public undertakings, probably allows little scope for derogations from Article 30. However, the Community has adopted two council directives in this field to introduce "equal conditions of competition for (public) contracts in all the member states, to ensure a degree of transparency allowing the observance of this prohibition to be better supervised."[63]

The first directive, adopted July 26, 1971, covers public works contracts. The second, adopted December 21, 1976, covers public supply contracts. The two directives are similar in format, but the notes in this section are based on the second one. The principal difference is that the first directive applies only to public works contracts of 1 million European units of account and over, whereas the second establishes for public supply contracts a lower minimum of 200,000 units of account. Presumably, contracts for less than these minimum amounts are still subject to Article 30 but not to the supervision system established by the directives.

The directive on supply contracts is a lengthy document with a preamble, 29 articles, many sub-articles, and annexes.[64] It attempts to prevent the various strategems commonly used for preferring domestic suppliers. Thus, the directive includes common rules relating to technical specifications, advertising of contracts, the criteria for selection of contractors, and the award of contracts. The basic problems to be overcome are clearly more difficult than they would be in a federation, e.g., there is no common banking system to facilitate information on the financial responsibility of contractors. The common advertising rules provide for all contracts subject to the directive to be advertised in the Official Journal of the European Communities, in the form prescribed in the directive.

There are exemptions: bodies that administer transport services are exempt, as are those that administer "production, distribution and transmission or transport services for water or energy and telecommunications services." Thus, the familiar public utilities are not covered.[65] There are further exemptions, e.g., on artistic grounds, on grounds of urgency, for replacement of original parts, and for goods quoted on a commodity market in the Community. Member states must report annually on the number and total value of these further exemptions. Data processing equipment was exempted until January 1, 1981. It should be noted that, in theory anyway, all these are exemptions not from the basic obligation of Article 30 but from the procedural requirements laid down by the directive.[66]

The directive points out that it does not prevent the application of Articles 36 and 223 of the treaty. Article 36 has already been described under "Treaty provisions and their judicial interpretation: goods." Article 223 relates to the responsibility of member states for their own security. It would exempt defence equipment from the effect of Article 30, but "products which are not intended for specifically military purposes" continue to be subject to the usual treaty rules.

So much for the exemptions. As to the products that remain covered, how effective are the treaty provisions and directives?

On the face of it, the rules would prevent public authorities in member states from *overtly* contravening Article 30 by discriminating against suppliers from other states. Thus, announced policies or, even more, legislation granting a local preference are presumably ruled out. Wyatt and Dashwood give the following examples of acts that would contravene the treaty:[67]

> "The policy of a government department not to buy imported office equipment."
>
> "A statutory provision requiring public utilities to obtain energy exclusively through a state purchasing agency."
>
> "A government directive to a public undertaking instructing it to purchase its company cars from a nationalized motor manufacturer."

However, disguised discrimination is not easily discovered or enforced. A Commission official said it was too early to judge the effect of the public supply directive, but the 1971 public works directive had been a "failure." Steven Joseph of the École des Affaires de Paris, who has been studying non-tariff barriers between member states, writes that "an outsider can be forgiven for assuming that EEC rules and directives (on public purchasing) exist solely to be flaunted on paper and flouted in practice."[68] The press reported in December 1980 that the British Department of Industry intended to favour domestic computer suppliers by splitting orders "to keep them down to a size which escapes GATT notice." The extent to which individuals and companies may invoke the aid of national courts to enforce the rules is unclear. This is especially true of the directives, which under Article 189 leave to the states "the choice of form and methods" of achieving the agreed objectives. In the case of the public contracts directives, not all states implement them by legislation, making recourse to the courts more problematic.

There is an Advisory Committee for Public Contracts, composed of representatives of member states, that meets two or three times a year to advise the Commission. Problems may be raised there.

## Pipelines and transmission lines

Transport by these modes appears to be excluded, perhaps unintentionally, from the coverage of the articles applying specifically to transport. At least the wording of Article 84 suggests as much. However, the use, as distinct from the construction, of pipelines and transmission lines is presumably covered by the more general articles of the treaty relating to the establishment of a common market for goods, based on the elimination of barriers and discrimination. The construction of particular pipelines and transmission lines could not, apparently, be decided by the council acting by a qualified majority, but would be a matter for agreement among the states concerned.

## Standards: health, safety and technical

While this is a convenient heading, the real subject is the "police power" which is exercised by political sub-units in federations and, in the EEC, by member states. It covers not only standards that relate to health and safety, and standardization of industrial products, but also measures imposed on moral grounds and, in the case of the EEC, other matters as well.[69] Britain has been able to exclude—on moral grounds—imports of pornographic films made in Germany.

The Community refers to most of the impediments to trade that arise from the use of this regulatory power as "technical barriers to trade". They have been defined as "trading difficulties resulting from national provisions covering the quality, composition, packaging or inspection of goods".[70] The Community is devoting a vast amount of effort to harmonize the legislation of the states in this area. "There are 200 to 300 cases on the books of the Commission at any given time." The Commission says that harmonization is not undertaken for the sake of harmonizing, but for several good reasons. The original reason was the removal of barriers to trade. A barrier could arise unintentionally, as when the states honestly differ about the most appropriate safety standards, or intentionally, for protective reasons, despite the injunction at the end of Article 36. Technical barriers can create obstacles to trade that are "often more insidious" than customs duties.[71] Subsequently, environmental and consumer protection and, more recently, the need to save energy, have been additional reasons for seeking to harmonize.[72]

Where a barrier can be shown to be protectionist it will be prohibited under Article 30. If, however, whether its motivation is good or bad, it passes the test of the "police power" in Article 36, the next step is for the Commission to get the Council to adopt unanimously under Article 100 a directive to harmonize "such provisions laid down by law, regulation or administrative action in member states as directly affect the establishment or functioning of the common market." As noted earlier, the court's important decision in the *cassis de Dijon* case at the end of 1978 has probably narrowed the scope of Article 36 and broadened that of Article 30. The more measures that fail the test of Article 36, the less will be the need to harmonize by adopting directives, a process which usually takes several years. "The suppression of technical barriers to trade in the Community is a long drawn-out business." As of May 1980 the likely effect of the court's decision was not completely clear, because there had been no further explanation of what the court meant by "imperative reason".[73]

Meanwhile, the number of directives passed has been considerable. In the 10 years to June 1979, a total of 180 directives had been passed in this field: 130 for industrial products and 50 for foodstuffs. Sixty more were awaiting approval. "Many more will be needed to remove the most serious technical barriers."

Directives have been adopted mainly in connection with the following subjects:

- automobiles (In June, 1979, three more directives were needed, on top of the 39 adopted, to establish a complete European specification. "This represents a higher degree of harmonization than exists between the states of the USA." Tractors and agricultural machines have also been the subject of a number of directives.)
- measuring instruments, e.g., taxi meters
- electrical goods, e.g., radio-electrical interference caused by appliances, safety standards, energy consumption to be indicated on household appliances
- chemicals (Numerous directives have been introduced to increase safety and to protect the environment.[74])
- textiles: standard descriptions of fibres
- foodstuffs: standard terminology, labelling and packaging, and additives.

There is a proposed directive relating to construction products, and work is proceeding on several Eurocodes relating to the safety, suitability and durability of structures.[75]

After notification of a directive, the states have a period, usually 18 months, to introduce the provisions into their own legislation and bring them into force. Directives are brought up to date periodically to keep pace with technical progress. Since member states implement directives, this is comparable to provinces in a federal state administering federal legislation.

There are two kinds of harmonization brought about by the directives, optional and total. The most common is the optional method. In this case, both Community and national standards exist together, but it is only products that comply with Community standards that may be sold in all states. A manufacturer who wishes to sell in his home market need be concerned only with national standards. It is optional harmonization that is used for most industrial products such as automobiles.

Total harmonization is where national standards are replaced by Community standards. "This is especially the case where requirements of public health or safety militate against the proliferation of competing national standards."[76] Examples are dangerous substances, the biodegradability of detergents, and radio-electric interference by appliances. In such cases, products that do not meet the standards are not to be sold even in the manufacturer's own country. On the other hand, no state may require more stringent standards than the Community ones.

In the case of cosmetics, a proposed directive (which may now be in effect) illustrates the scope of directives aimed at potentially harmful products. It sought to limit the use of dangerous substances, to require certain information on the package, and to prohibit unjustified advertising claims. While the proposed directive laid down Community standards, it included a provision that would give a member state the right to suspend the sale of a product that it considered a danger to health. The suspension would be valid for one year, during which time the Commission would investigate whether the concerns were scientifically well founded.[77]

The Commission points out that harmonization by directive does not necessarily imply uniformity of design. Safety standards for cars don't require that all cars look alike.

There is a serious drawback to removing barriers by directives. "Whereas a few years ago the task of Commission officials was to draw up new proposals and justify them to the other Community institutions, today much of their work is taken up with the management of directives already adopted, i.e., controlling their implementation in member states (nearly 250 actions for infringement are pending) and adapting them to technical progress."[78] "The aim is not to accumulate directives, but to remove hindrances to trade." Consequently, the Commission intends to place "as much emphasis on the prevention of barriers as on the removal of those already created."

Procedures to prevent the creation of barriers already existed when this policy was announced by the Commission, but they have not worked well. Although the states are "morally committed" to give the Commission advance drafts of their legislation, there is a deadline for the Commission to respond and for the Council to act, and in practice the technical complexity of the subject matter does not suit the deadlines that were established. The Commission was planning to make specific proposals in the summer of 1980 regarding improved procedures.

In addition to barriers that result from legislative or administrative action by governments, there are barriers that result from the adoption by industries in member states of voluntary standards. The field of industrial standards is within the competence of national governments, subject of course to treaty provisions, some of which have already been noted. But standards that are not obligatory do not contravene Articles 30 and 34, and they cannot be the subject of directives because Article 100 is restricted to government measures. The Commission is, therefore, obliged to promote co-operation among the several national authorities concerned. In the private sector, there are two European bodies that co-ordinate standards: one in the electrical field and one for other products. However, many standards are still not co-ordinated. The Commission believes that these bodies are ineffective and that their meetings "should cease to be a confrontation of national interests, and become a forum for the pooling of information by the national experts".[79]

To help remedy the deficiencies in this area of voluntary standards, the Commission has announced its intention to become more closely involved with the national authorities responsible for standardization policy and to undertake other measures.[80]

## Transport

This is a huge sector, important to ensuring free movement and to the economies of member states. Part Two of the EEC Treaty covers "Foundations of the Community," including the key articles dealing with free movement. Title IV of Part Two is composed of Articles 74 to 84, covering transport by rail, road and inland waterway. For these modes of transport, the states are required by Article 74 to pursue a common transport policy. After the transition period this policy is to be implemented by a qualified majority of the Council, so far as, for example, "common rules applicable to international transport" between the states are concerned. Two kinds of discrimination are expressly prohibited: that which discriminates against goods on the basis of their country of origin or destination (Article 79); and that which discriminates in favour of "one or more particular undertakings or industries," unless authorized by the Commission (Article 80).

The problems in implementing a common transport policy are of course immense,[81] but the following are examples of a few of the Community's achievements.

- Since 1955 there have been direct international tariffs for the transport of coal and steel by rail, based on the same price-distance relationship no matter how many frontiers are crossed. Fluctuating exchange rates present a practical difficulty not present in a federation.
- Measures have been implemented to assure the comparability of railway accounting systems and uniform costing principles.
- Regulations that specify the maximum permitted driving hours for truck drivers have been established.

Article 84 leaves to the Council what provisions should be laid down for sea and air transport. A common policy has been adopted for both types.[82]

The modes of transport covered by Title IV are not subject to the normal treaty articles relating to competition, notably Article 85(1), but are subject to separate regulations. Sea and air transport are, apparently, likewise not directly subject to Article 85, but the states or the Commission may "presumably" take action under the transitional provisions in Articles 88 and 89.[83] Press reports in May 1980 stated that some private airlines wanted to bring before the European Court the cartel arrangements now in force covering air travel within the EEC.

## CAPITAL[84]

Abolition of obstacles to the free movement of capital is provided for in several treaty articles. However, since the Community is not a monetary union, foreign exchange restrictions are permitted to protect economic conditions and stability, and such goals take precedence over the free movement of capital.[85] Thus the economic equilibrium goals described in Article 104 prevail over Article 67, the principal article concerned with free movement of capital.

It is said that the treaty fails to provide a workable definition of capital movements. A definition is attempted in two Community directives by enumerating certain specific transactions. This enumeration differs from other international attempts, suggesting that the problem is not easy.

The directives which have been adopted divide transactions into four categories, the general principle being that greater liberalization is required for the less volatile transactions that generally are not involved in speculative currency movements. Italy and Ireland, and for some categories France, Denmark, and possibly the Netherlands, still maintain exchange restrictions. The other states are mainly liberalized. French and Italian restrictions are partly motivated by a wish to reduce scope for tax evasion.

Direct investment between the states, including takeovers, must not be prevented on the grounds of nationality, although there are political sensitivities in all states. For example, "Daimler Benz would not dare buy out Peugeot." It is said that foreign companies interested in acquiring majority holdings in French high technology companies would be deterred and probably prevented by government action. A December 1980 press report said that "bankers under the thumb of the French government blocked the move by Italy's Ferruzzi group to take over Beghin-Say, France's biggest sugar refiner."[86] France is probably not the only offender.

The freedom to "acquire and use land and buildings" in another state is guaranteed to Community nationals by Article 54(3)(e), subject only to agricultural policy restrictions. This guarantee is probably confined to people or corporations establishing themselves on the purchased land. It is not clear whether other treaty articles give Community investors a right to buy real property they do not intend to occupy. In any event, there appear to be no laws outside the agricultural field against purchase by Community non-residents.

Also, it is not clear why certain income tax measures persist that encourage domestic investment, and that appear to contravene Article 67, i.e., the German *Kuponsteuer*, the French *avoir fiscal* and the Belgian *crédit d'impôt*.[87]

In this field, indirect barriers to free movement are significant. One of them is the uncertainty created for investors by fluctuating exchange rates. Others are comprised in the "investment legal infrastructure," which the Commission is attempting to harmonize. Efforts in the field of company law are considerable, although much remains to be done. Important first steps also have been taken in securities regulation, and regarding credit institutions such as banks; and proposals have been made for the harmonization of corporate and other taxation. The underlying motives include protection of investors and, in takeovers, of employees too.

## PEOPLE

### Treaty provisions and their interpretation[88]

So far as the free movement of people is concerned, an obvious difference between Canada and the EEC is that in Canada there is a common citizenship, with numerous inherent rights for those who move to another province, many of which are taken for granted; whereas in the EEC citizenship is left to the states, and there are only certain treaty rights that establish a form of citizenship in the Community itself. Also, the treaty is mainly concerned with economic matters. These factors explain why the treaty adopts an apparently cumbersome approach to the free movement of individuals. It deals separately with three headings: workers (Articles 48 to 51); the right of establishment for self-employed individuals and companies (52 to 58); and the freedom to provide services across state boundaries (59 to 66). The separate treatment of workers and the self-employed may no longer be logical in the light of the court's interpretations, which give the self-employed many of the same rights as workers. Also, anomalies arise because, for example, doctors in the U.K. are mostly salaried, whereas elsewhere they are mostly self-employed. It has been noted earlier that there are problems, too, with the distinction between the right of establishment and the right to provide services.

Despite the economic content of the treaty, the basic motivation was political, and the free movement of people was one of the important ways in which Europe would be knit together. The court has recognized this. It "has certainly interpreted the provisions of Articles 48 to 51 of the treaty, and the implementing legislation made thereunder, in a rather more liberal manner than would be dictated by a purely functional view of the treaty based on its economic objectives."[89]

### Workers other than those in the professions[90]

Rights under the relevant articles have been broadly interpreted by the court in keeping with the notion that people are not just workers. Article 48 and the principal directive, 68/360, which ensures entry and residence for Community workers, have been held to have direct effect. Community nationals may enter a member state to look for work and, once employed, they must be given a residence permit as proof of their right of residence. No work permit is required. The worker's dependent family has the same rights. Also, "member states may not demand exit visas or equivalent documents from workers or members of their families."

A worker who quits his job is no longer a "worker" for the purposes of Article 48, and he may lose his right of residence. However, it may be argued that so long as he remains genuinely in search of a job he would be protected by Article 48. If it "becomes apparent that he is unlikely to find a job, he may be required to return to his country of origin, or to the state where he was last employed. An extended period of employment in a member state, however, entitles an unemployed worker to the same opportunities as a member of the indigenous workforce, i.e., indefinite equal access to the host state's . . . unemployment benefits."

Regulation 1612/68 ensures equal treatment with regard to eligibility for employment, employment conditions, and workers' families. With regard to eligibility there is an exception "in the case of linguistic requirements necessitated by the nature of the post to be filled." Member states' employment services are supposed to assist migrant workers on the same basis as their own nationals. A number of steps have been taken to facilitate equal access to jobs. For example, years of service with the merchant fleet of different states can be accumulated by seamen to qualify for a certificate.

A migrant worker may not be treated differently "in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, re-instatement or re-employment." Regulation 1612/68 also requires that migrant workers be given "the same social and tax advantages as national workers." The court held that this extends to all such advantages, both within and outside the contract of employment. A member state must give employed nationals of other states all the legal advantages it provides for its own citizens.

Dependent families of workers also qualify for these advantages. For example, the regulation requires that "the children of a worker residing in the territory of a member state shall be admitted to that state's general educational, apprenticeship and vocational training courses under the same conditions as nationals of that state."

Article 48(3) says free movement may be limited on the grounds of public policy, public security or public health. There is a similar proviso in Article 56(1) relating to freedom of establishment. A 1964 directive contains procedural safeguards and says the proviso may not be invoked to serve economic ends. The court says the proviso must be strictly construed. For example, a person's criminal convictions are not alone sufficient grounds for refusing entry. The court has allowed the U.K. in one case to discriminate against and exclude a Dutch national who was to take up employment there with the Church of Scientology. The exceptional nature of the case is emphasized by a later judgment of the court in which it refers to the European Convention on Human Rights as a possible standard to judge the actions of member states. There is a less important proviso in Article 48(4): an exception with regard to employment in the public service. The provision does not apply to all such employment. It "could be invoked to restrict the *admission* of foreign nationals to *certain activities* in the public service, but not to justify discrimination once they had been admitted," except possibly for promotion to sensitive posts.

In addition to these treaty provisions, the Community's social policy very much concerns workers. There are directives that cover employees' rights in the event of mergers, company bankruptcy, and mass dismissals, as well as equal pay for men and women (a court decision was important here) and their equal access to employment opportunities. Equal treatment of men and women by the social security system is to be implemented by 1984. There is also a recommendation (not binding on member states) regarding a 40-hour week and 4 weeks annual paid holiday. The European Social Fund pays grants to facilitate training programs and in certain situations workers' change of residence to take up new employment.

The above paragraphs relate to migrants who are nationals of member states, not to third country migrants from outside the Community. The former are less mobile geographically, occupationally and socially than Canadians and Americans. They used to compose three-quarters of migrants in the EEC, but now only one-third. Third country migrants do not have equivalent rights, e.g., Turks may not go to Germany to seek work. The free movement of workers from Greece, the EEC's 10th member state, will be phased in over a period of years. During this period they will have a preferred status over nationals of third countries.

While the achievements of the Community regarding the free movement of workers are impressive, it cannot be said that Community migrants in practice enjoy to the full the same advantages as the nationals of the host state. The Commission's "Action Program in favour of Migrant Workers and their families" (*Bulletin of the European Communities*, Supplement 3/76) identifies the areas where further measures are required. The program, which covers Community and non-Community migrants, has simply been noted by the Council, and vigorous steps to implement the recommendations seem unlikely so long as difficult world economic conditions persist.

## The professions

Whereas the key article for the free movement of workers is Article 48, the corresponding provisions for self-employed persons, including those in the professions, are found in Article 52, which concerns and defines the right of establishment, and in Article 59, relating to the provision of services across the boundaries dividing the states.[91]

The right of establishment may be described as the right to settle in a member state and to pursue economic activities. Self-employed Community nationals have this right, and they generally enjoy the same rights as workers do to receive equal treatment and to stay on in the host country after retirement, etc. The court has given the free movement of professionals a big push, although major barriers remain.

Difficulties arise for professionals where diplomas or licences are required, and there are more such difficulties than for workers. While the right of establishment has direct effect it must, in such cases, be "facilitated" by Community secondary legislation aimed at reciprocal recognition of diplomas.[92] Such recognition of medical diplomas "must be regarded as a breakthrough."[93] For medical doctors, nurses, dentists, veterinarians and midwives, the Commission fixes minimum standards that are administered by the states. For such people the right of establishment is meaningful. Only a small proportion are likely to move because of natural impediments, but the principle is important. The problem of pharmacists' qualifications is now being tackled.

Like the medical field, and unlike law, the subject matter of architecture and engineering is universal. While progress towards mutual recognition of architects' diplomas has been slow, the prospects are now brighter.

The prospects for mutual recognition of lawyers' diplomas, and, therefore, for a meaningful right of establishment, are dim. Accountancy is complicated by differences among the states in company and taxation law, but there the prospects are better. Stimulated by the needs of multi-national corporations, there appears to be a trend to harmonization of accounting methods and disclosure requirements. Meanwhile, the Commission has proposed a directive for accountants containing a more limited goal than reciprocal recognition of diplomas, namely, establishing minimum qualifications for statutory auditors.

Article 55 excludes the right of establishment where official authority would be exercised by those concerned, e.g., notaries. But the court interprets this exclusion narrowly, so that the right is denied only in regard to certain *functions* of a professional person, not to the profession as a whole.

A major problem for the Community in the field of professional qualifications is that, unlike in Canada and the United States, there is little unity in the general education system.

Meanwhile, where the absence of diploma recognition stands in the way of the meaningful exercise of the right of establishment, the Commission tries to ensure, by way of directives, the possibility for professionals to provide services across state boundaries.

As to lawyers' services, where a bar prescribes academic qualifications for admission, and an applicant from another state has an acknowledged equivalent, he must be admitted. He may appear before the courts, e.g., in theory a French lawyer could act for a client even before the British House of Lords; but where local law requires that the client be represented by a lawyer, the foreign lawyer may be required to be accompanied by a local lawyer; the rules of the host country apply. A lawyer may simply advise clients in another state without appearing before the courts; the rules of his own country apply. In all these situations the foreign lawyer must use his own title, not the title in the country where the service is being provided.

Whether it is a question of providing services in one's adopted country or providing them across the boundaries of member states, professionals may not be discriminated against on the grounds of nationality or language nor, in the case of trans-boundary services, on the grounds of non-residence.

### Migrants' access to social benefits

This is a subject of crucial importance to free movement and is recognized as such by the treaty. The Council is required by Article 51 to "adopt such measures in the field of social security as are necessary to provide freedom of movement for workers." In the EEC, where public pension schemes are, in some countries, relatively more important, compared with private schemes, than in Canada, the establishment of suitable arrangements is of added significance.

The Council's 1971 regulation ensures for Community migrants and certain dependants the same treatment as nationals, aggregation of a migrant worker's contributions made in several countries, and payment of benefits by a member state to a worker resident in another state. However, there are wide differences in structure and benefits in the states' social security systems and no attempt to harmonize, only an attempt to ensure the attainment of the narrower purposes described here. One example of the fairly generous interpretation of these objectives by the court is that medical benefits cover workers who receive treatment in another state while on holiday. The court's reasoning is that free movement of workers is not strictly limited by the economic requirements of a common market, and that removing territorial limitations on the application of various security systems will inevitably result in benefits accruing to workers who are not migrants and occasionally to persons who are not workers at all.[94] Community workers who daily cross frontiers are subject to the social security legislation of the country where they work, which will pay the cost of health and welfare services provided in the country where they live.

The fact that social assistance is more generous in some countries is not a major factor in decisions to move.

### Political rights of migrants

The right of migrants to vote in local elections is accorded in some states and it seems likely that all may soon agree. The right of migrants to vote in state and national elections and to stand for office seems more remote. Decisions about citizenship are left to the states.

### Discriminating against workers from other member states

Legally, this is against treaty rules, except within the comparatively restricted scope of the allowed exceptions (see above).

### Community passport and driver's licence

The prospects for a Community passport are good, according to Commission officials. Treaty rules regarding free movement have already affected the autonomy of member states regarding passports, including in the United Kingdom, the exercise of the royal prerogative. Member states are under a duty to issue and renew passports so as to allow free movement in the Community.[95]

Agreement was reached in mid-1980 on a Community driver's licence. All EEC national driving licences will be exchangeable from

1983 without a further test, and by 1986 all states must issue new drivers with a common EEC licence.

## OTHER POWERS AND POLICIES RELATED TO FREE MOVEMENT

### Competition policy

The competition provisions in the treaty are a key element in the common market scheme:

> It would be futile to require the abolition of customs duties and charges having equivalent effect and of quantitative restrictions having equivalent effect if the isolation of national markets could effectively be maintained by restrictive practices on the part of undertakings, or by state aid policies giving competitive advantages to the national industries.[96]

The treaty provisions apply both to private and public enterprises and to state aids. A Commission publication[97] states the objectives of EEC competition policy as follows:

> (1) removing trade restrictions in the form of cartels, market-sharing agreements, export bans, etc.;
>
> (2) ensuring that excessive concentrations of economic power do not adversely affect the consumer or other competing firms; and
>
> (3) preventing aids given by national authorities which discriminate between industries or distort competition and adversely affect the correct operation of the market economy and threaten the very existence of the Common Market.

The treaty provisions dealing with the "Rules on Competition" are contained in Articles 85 to 91, and, for "Aids granted by States," in Articles 92 to 94. The Preamble of the EEC Treaty and the fundamental Articles 2 and 3 have also "played a very important part in the development of the case-law on competition."[98]

State aids are discussed in a subsequent section of this paper. The following paragraphs relate to trade restrictions and concentrations of economic power.

With some exceptions, the treaty provisions and Regulation 17 of 1962 enable the Commission, which administers the policy, to exercise much the same powers that national governments have to attack restrictive practices and "abuse of dominant position." One important power it does not have, except in the coal and steel industries under the ECSC treaty, is the power to prevent mergers, although certain mergers may themselves automatically constitute "abuse of a dominant position."

Articles 85 and 86 prohibit certain practices that "may affect trade between member states," and this phrase helps to draw the line between the jurisdiction of the Commission and that of national competition authorities. In fact, the phrase has been interpreted widely by the court: "its fulfilment is virtually a formality, or at any rate does not constitute a serious obstacle in establishing infringements."[99] The court has ruled that the effect on trade may be direct or indirect, actual or potential, and may be present even though a restrictive agreement does not concern imports or exports. The Commission will not act, however, unless an agreement "appreciably" affects trade.

It is compulsory for firms to notify the Commission of agreements liable to infringe the rules. To reduce its workload and to achieve certain policy objectives, such as the encouragement of small business, or to adapt to changing economic conditions, the Commission creates exemptions with regard to prohibited practices and the notification procedure. For example, "when the demand for certain goods registers an unforeseen structural regression, the Commission can, under certain conditions, authorize agreements for co-ordinated reduction of over-capacity."[100]

The Commission's powers of enforcement are considerable. It has, through the authorities of member states, access to premises and relevant documents. It can also levy fines that are, however, subject to review by the Luxembourg Court. It levies fines on companies that abuse a dominant position by charging higher prices in one state than in another; and even if the company has not a dominant position but is engaged in the same practice, by preventing "parallel exports" from the market where the price is low to where the price is high, a fine may be levied.

The Commission may often be in a position to move faster against such practices than the competition authorities of the states, who also have powers to enforce Community law, because the legal procedures of national authorities tend to be more cumbersome. Some lawyers complain that the Commission is at once prosecutor, judge, jury and executioner. This has resulted in a good deal of the enforcement being left to the Commission, but often there is inadequate enforcement because of staff shortages. A further factor that makes Community competition law less effective is the absence of a developed doctrine, such as exists in the United States, whereby a private plaintiff may sue to recover damages resulting from restrictive practices.

The Community's enforcement of Article 85, restrictive agreements, has been more successful than its enforcement of Article 86, abuse of a dominant position, largely because of the difficulty of proving the latter to the satisfaction of the court.

## Consumer protection

The EEC Treaty mentions consumers only in relation to CAP and competition policy. In the 1970s the Community's activity in consumer protection began to take shape, and it now is one of the important motivations for harmonizing legislation and administrative practices. Treaty authority for Community action is believed to lie in the basic Articles 2 and 3. In June, 1979, the Commission addressed to the Council a draft council resolution, which said "the improvement of the quality of life is one of the tasks of the Community," and "fulfilment of this task requires a consumer protection and information policy to be implemented at Community level."

While the "quality of life" is not actually mentioned in the treaty as a specific activity or task, aspects of consumer and worker protection are mentioned, and there can be no doubt that national activities in this field that are not co-ordinated have a direct effect on trade in goods and services. The following excerpt from a Commission publication[101] makes this point:

> With the opening up of national markets and the free movement of goods throughout the Community, consumer problems have taken on a European dimension:
>
> the consumer should not, for example, suffer any disadvantages regarding guarantee, after-sales service etc. when he buys a product from another country where the requirements are less strict;
>
> conversely, national requirements protecting consumer rights should not help create new obstacles to free trade.
>
> It is the Community's job therefore to standardize protective regulations to guarantee both the correct functioning of the Common Market and the protection of consumer interests.

The Council resolution of April 14, 1975, provides for "a European consumer rights charter and an action plan." The five basic rights, which are a guide for policy by member states rather than legally enforceable rights, are as follows.[102]

(1) Health and safety:

A number of directives harmonize legislation. Some have already been mentioned in the section of this paper on standards.

(2) Protection of economic interests:

A number of directives have been proposed, including one on the important subject of manufacturers' liability for harm caused to users by a defective product, and another on misleading advertising. Possible regulations controlling tour operators are being discussed.

(3) Redress:

Efforts are being made to standardize and simplify legal procedures for obtaining settlement of consumers' claims.

(4) Information and education:

Community activity includes a pilot program for the consumer education of school children. Twenty schools located in all states were involved in October, 1979. The Council has also adopted a mandatory requirement for retailers to display prices of foodstuffs in a manner that permits comparison of unit prices (per kilo or litre).

(5) Consumer representation:

There are arrangements for consultation.

## Long term and structural policies

### • Education and vocational training[103]

There is no reference in the treaties to an education policy, although there are references to vocational training. For example, Article 118 of the EEC Treaty gives the Commission the task of "promoting close co-operation" in such matters as vocational training and employment. Education is "inseparable" from these matters.[104]

A Community action program for education was adopted by a Council decision of February 9, 1976, to be implemented both at the national and at the European level. An Education Committee composed of representatives from member states and the Commission co-ordinates and supervises the program.

Included in the program are the following:

(1) Cultural and vocational training for migrant workers from EEC states and third countries, and education for their children;

children are to be trained in the language of the host country but they also would have "the option of tuition in their original language and culture."[105]

(2) Closer links between member states' education systems—

to help mutual recognition of qualifications and thus promote freedom of movement;

to facilitate teacher and student mobility at all levels of education.

(3) Encouragement for the teaching of foreign languages.

The education ministers have agreed to encourage the introduction of European studies into school courses. Also, the post-graduate European University Institute has been established in Florence to be a centre for teaching on Europe and its problems.

Member states have recently agreed on the principle of equal access by Community students to university places. Britain has decided to charge EEC students the same university fees as British students pay, rather than the higher fees to be paid by overseas students.

Community action is well-established in the field of vocational training. For example, the European Social Fund and the European Coal and Steel Community give grants for training and retraining workers who would otherwise be unable to find jobs.

### • State aids to industry and regional development

In this area there are expenditures by national governments, on which the treaties impose restraints, and there are smaller but still substantial expenditures by the common institutions of the Community. The subject will be discussed here under four headings: (a) Treaty provisions regarding state aids (b) Sectoral aids (c) Regional aids (d) General aids and state enterprises.

#### (a) Treaty provisions regarding state aids[106]

State aids that are not co-ordinated can give rise to unfair advantages for the firms of a given state, a "reciprocal neutralization" of individual members states' policies, a "shifting of difficulties" from one state to another, or even new difficulties. Co-ordination at the Community level is therefore essential if the economic aims of individual states are to be achieved without causing mutual harm and expense.[107] While there are provisions in the ECSC Treaty, these notes are confined largely to EEC Articles 92 to 94.

Article 92(1) contains a general prohibition of state aids that distort competition, in so far as they affect trade between the states. State aids do, in practice, usually affect such trade. The court has defined what measures constitute state aids for the purposes of the ECSC Treaty, and the Commission in 1963 gave a list of them (amended in 1968) in response to a written question from the EEC Parliament. It is a long list, and the court's interpretation is wide.[108] The effect of the aids is considered to be more important than their form or purpose, and aids granted by regional or local authorities are covered as well as grants by central authorities. In most cases it is not difficult for the court to determine whether a prohibited aid has been granted, but in one case it can be difficult: where the host country agrees to provide "infrastructure" that relieves a firm of certain costs it would otherwise have to meet.

Article 92(2) provides for certain fairly straightforward exceptions, such as aid to make good the damage caused by natural disasters.

Article 92(3) provides for the really important exceptions from the general prohibition of 92(1). Four categories of aid *may* be considered to be compatible with the common market. These categories are as follows:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious unemployment;

(b) aid to promote the execution of an important project of common European interest

- such as cleaning up the Rhine, saving energy, or research and development,

or to remedy a serious disturbance in the economy of a member state;

- the Commission has used this as a "safety valve in the economic troubles with which the member states have been beset since 1974," e.g., aid to ensure the survival of firms and to create jobs for young people;[109]

(c) aid to promote the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest...

note that the qualification about the common interest does not apply to the more serious regional situations under (a).

The Commission has authorized aid to ailing industries such as shipbuilding and textiles and to growth industries such as electronics.

(d) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

Articles 93 and 94 provide for administration of Article 92. The responsibility is largely that of the Commission; an appeal from a member state or an affected firm lies to the Luxembourg court. The procedures established are particularly interesting and worth noting in some detail.

Article 93 gives the Commission the duty of keeping state aids under review. If, after giving notice to those concerned, it finds that an aid contravenes the rules, it is bound to ask the state concerned to abolish the aid within a given time limit. If the state does not comply, the Commission or any interested state may refer the matter directly to the court, without going through the usual preliminaries of Articles 169 and 170.

The offending state then has, in theory, a way of forestalling an adverse judgment. It can appeal to the Council for a unanimous decision that the aid shall be considered an acceptable derogation from Article 92. In practice, it is unlikely that a unanimous waiver would be forthcoming. If the Council does not make its attitude known within three months, the Commission may proceed.

Member states must inform the Commission of "any plans to grant or alter aid," and the Commission has, as the result of a judicial decision, two months in which to object. Under Article 94 the Council may, acting by a qualified majority on a proposal from the Commission, *inter alia* exempt categories of aid from this notification procedure; it has not exercised this authority.

If an aid has not been notified or if the Commission has objected, an individual may take action in the national courts to prevent the granting of the aid in question, i.e., the procedural requirement has direct effect.

### (b) Sectoral aids

The Commission's policy with regard to Article 92 sectoral aids is best described in the context of the Community's industrial policy.[110] The Community helps both to reorganize industries in trouble and to promote growth sectors.

As to industries in trouble, the Community "permits rescue schemes on condition that they do not increase capacity. . . or maintain an unsatisfactory status quo."[111] The industries helped include the following:

- Steel. A voluntary cartel has recently been replaced by a mandatory scheme of production quotas administered by the Commission under Article 58 ECSC. The various Community grants, usually linked with national grants, for worker retraining and relocation will presumably continue.

- Shipbuilding. The Commission has said there must be a 40 per cent reduction in capacity and that aids must fit that objective.

- Textiles. Operating aids are banned entirely; other aid must be related to a reduction of capacity. For synthetic fibres all aid is forbidden, because excess capacity is so great, but also because the industry will survive without aid.

With regard to growth industries, one rationale for intervention is that pooling of member states' capacity is required "to reach the scale required by international competition." This is the case with the aerospace and data-processing industries. For these industries and some others, such as pharmaceuticals, the general approach may be described in these terms: "It is the growth industries that can bring increased employment. But obstacles within the EEC must be removed so as to avoid fragmenting the market and to make EEC producers more competitive internationally."

### (c) Regional aids

There is Community aid, and there are controls on the relatively larger aid granted by the states.

The only vehicle for Community aid which is specifically dedicated to regional aid is the European Regional Development Fund. Most of the fund is allocated by agreed country quotas. All states benefit; before the entry of Greece, Italy was receiving about 39 per cent, the United Kingdom 27 per cent and France and its overseas departments 17 per cent. On a per capita basis Ireland and Italy were the biggest beneficiaries.

This quota section of the fund is disbursed through member states according to their priorities, and benefits the regions they select. The money is not allocated *en bloc* to governments but in relation to specific projects approved by the Commission. National governments can either pass the money on to the investor or treat it as part reimbursement of national aid for the project in question. What actually happens is that "in all member states grants to industrial investments are retained by the national authorities; for infrastructure investments the grants are in most cases passed on to the local authority involved, though practice varies from country to country."[112]

Requests for a grant can be made only through the national authorities of member states, within the framework of their regional programs, and the fund imposes a ceiling on its share of the cost of the investment. The Commission examines the requests and consults a regional policy committee, composed of representatives of the states, before making its decision. In case of disagreement the matter is referred to the Council of Ministers.

A small part of the fund, provisionally limited to five per cent, is quota-free. Its purpose is to help the implementation of Community policies in other fields or to offset any adverse regional consequences they may have.

Regional aid represents a relatively small share of the EEC budget. There is, of course, no revenue equalization system for member states. The principal inter-regional income transfers take place through the disbursements under CAP. Since the transfers under CAP benefit mostly the richer regions of northern Europe, because of the particular agricultural products that receive most support, it is argued "that CAP is effectively scuppering the EEC's official regional policy. The EEC budget for dairy products alone is six times higher than the regional fund."[113]

Community aid for regional development is also effected through other channels that are not solely dedicated to regional development. These include the European Coal and Steel Community; the European Investment Bank, which lends about 70 per cent of its funds for projects in the less developed areas; the European Social Fund, mostly used for grants for training workers, and mainly in problem areas; and the European Agricultural Fund. Also, special loans at reduced interest rates are to be made to Italy and Ireland in the next few years in relation to their participation in the European Monetary System (see later section of this paper).

The Community's total regional aid "has not been negligible," but in the Commission's view it has been too scattered to have sufficient impact.[114]

The bulk of regional aid is effected through the budgets and agencies of the states. "The EEC Regional Fund is small because the states prefer to hand out their own incentives." All member states have their own regional development programs. Tax incentives are used aggressively; for example, the cost of a chemical plant built in a special development region of Britain can be written off in one year against tax liability; advertisements of Ireland's Industrial Development Authority promise for manufacturing industry "no tax on export profits until 1990, then a maximum of 10 per cent on all profits until the end of the century."

Controls on state aid for regional development are imposed under Articles 92 to 94 to prevent "a sort of aid auction." Also, common rules make it possible "to ensure that incentives are greatest in the areas of greatest need rather than in those able to pay most."[115]

The Commission adopts a series of principles for exercising its supervisory responsibilities with regard to regional aids. The most recent series applies from January 1, 1979, for an initial period of three years.[116] Three of the principles are as follows:

- Different ceilings are imposed according to region. These ceilings range from a maximum of 75 per cent of initial investment costs, or 13,000 European Units of Account per job created, for regions such as Ireland, southern Italy and West Berlin, to 25 per cent of initial investment costs for unspecified areas, i.e., those that are more central and industrialized. Greenland is not subject to any ceiling. Derogations may be allowed from the ceilings in special circumstances, but prior notification and authorization of the Commission is required.

- Aid must not be dispersed throughout a region at the maximum level.

- Aids must be "transparent." that is, it must be possible to measure the benefits accurately in relation to the cost of the initial investment. The Commission has in co-operation with the states established criteria for comparing different forms of aid.

### (d) General aids and state enterprises

The general aids of the Community's institutions, such as the loans of the European Investment Bank (EIB), have already been mentioned.

One recent addition is the "Ortoli facility," properly called the New Community Instrument, which is designed to complement the EIB's activity by making loans for projects "which are consistent with priority Community objectives in the infrastructure and energy sectors." The facility is administered jointly by the EIB and the Commission; the loans are for the account and at the risk of the Community rather than of the EIB.[117]

Individual states also have general aid schemes, not aimed at any particular region or sector. They like to have statutory authority in place that enables them to act quickly when needed. These general schemes pose a problem for the Commission because, until they are implemented in specific cases, one cannot always tell whether the actual grants will qualify as one of the exceptions authorized under Article 92. Consequently, the Commission requires advance notification when grants are to be made, either of a general aid scheme or of important individual grants.[118]

A couple of years ago, the Commission was advised of a grant that the Dutch government proposed to give to a cigarette manufacturer, Philip Morris. The Dutch general aid scheme in question authorizes a 4-per-cent premium grant for especially large investments. The Commission concluded that the premium was not justified, and in the summer of 1979 it decided to prohibit the grant. Philip Morris decided to take the Commission to court. While there have been previous court cases on technical matters, such as what constitutes aid, this was the first time the Commission had been challenged on a question of judgment. Philip Morris was arguing that the Commission was obliged to show that the additional grant would distort the market; the Commission argued that it was unable to define the market in a hypothetical situation. It was expected that the court's decision would have important consequences for the Commission's powers. The case was due to be heard at the end of the summer of 1980.

In the winter of 1980/81 there was a failure to agree internationally on limiting interest rate subsidies for export financing. France argued that the Community has no authority to apply limits where member states are concerned, but the Commission affirms that it has.

One especially difficult area is where aid is given to state-controlled enterprises. Such aid is subject to supervision under Articles 90 and 92 to 94, but enforcement by the Commission is difficult because of the lack of transparency in financial dealings between national governments and the enterprises they control. On July 25, 1979, the Commission "mapped out its general approach to the preparation of a directive on transparency in member states' relations with public undertakings."[119] It subsequently issued a directive, relying upon Article 90(3) which authorizes the Commission to "address appropriate directives or decisions to member states" regarding the articles in question. However, it ran into opposition, especially from France, Britain and Italy, who assert that the Commission cannot issue a *general* directive, because that right is reserved to the Council under Article 94. They have taken the Commission to court, according to an October 1980 press report.

The Commission's directive requires member states to keep a record of all financial assistance given to public undertakings having a certain minimum turnover over the last two years. "If it suspects foul play, the Commission wants to be able to see the books."

### • Protection of the environment

Since this is a comparatively new concern of public policy at the national and international level there is no specific mention of it in the EEC treaty. However, the treaty is apparently flexible enough to accommodate Community action because the Council has adopted a number of directives, which are enforceable against member states in the Luxembourg Court. The authority is, it seems, found in the preamble and introductory articles of the treaty. For example, the preamble says the member states' objective is "the constant improvement of the living and working conditions of their peoples."

A Commission publication[120] justifies Community action on the following grounds:

(1) The preamble to the treaty.

(2) Most of Europe's lakes and rivers are shared by more than one country.

(3) Air polluted by sulphur dioxide travels through the whole of Europe.

(4) While one country may try to protect migratory birds another may try to massacre them.

(5) To enable goods such as detergents to be freely traded, the levels of permitted pollutants must be harmonized.

(6) Pollution control increases manufacturers' costs. "If the same requirements and regulations are not applied in all Common Market countries, competition will be distorted."

(7) Much research is required: European laboratories should cooperate and share the work.

(8) "Less preoccupied than national governments by short-term management problems, the Community is well-placed to take a long-term view of things."

The following are examples of action taken by the Community:

(1) A directive requires prior authorization for discharging dangerous substances into the aquatic environment.

(2) There are directives on motor vehicle exhaust gases and the lead content of petrol.

(3) Directives specify noise levels for cars, trucks, motorcycles, and construction equipment.

(4) There is a joint program on radioactive waste.

(5) Joint research is carried out at the Community's Joint Research Centre at Ispria, Italy.

However, there are evidently some important gaps in Community harmonization. In the economically backward areas the environmental rules for some things, e.g., a petrochemical plant, are less strict than elsewhere.

In 1975 the Community adopted "the polluter pays" principle. Exceptions are allowed regarding state aids for existing firms, in the framework of certain rules. New firms must satisfy environmental requirements without state financial assistance.[121]

## Commercial infrastructure

### • The European Monetary System[122]

The absence of a monetary union is an important barrier to further integration. The next best thing to such a union is to confine exchange rate fluctuations among the states within narrow limits. This was the purpose behind the "Snake" arrangements (which were not really successful), and it is the principal motive for the establishment of the European Monetary System (EMS), which came into force on March 13, 1979. All nine member states except the United Kingdom agreed to participate. The participation of France was conditional on the progressive removal of the agricultural monetary compensatory amounts relating to the "green currency" rates.

"To help the least prosperous countries adhere to the monetary and economic disciplines laid down in the system, supplementary economic measures have been decided on." Italy and Ireland will benefit from loans to finance infrastructure projects at specially low interest rates. Press reports say these rates will be three percentage points below what the EEC's triple A credit rating normally requires.

The EMS, according to a Commission publication, is "a step on the road to complete monetary union."

- **Commercial law, company law and securities regulation**

Community activity in this field is considerable.[123]. It is a field that touches on a number of others, such as labour law and consumer protection, and that can have important effects on free movement. For example, national laws in the Community, as well as an OECD code of conduct, require companies to pay compensation to redundant workers. Such liabilities can be substantial, and differences in national requirements affect the location of businesses.

The Community wants to create an underlying "Community legal environment." "In order to encourage free movement of goods, people, services and capital, and a system in which competition is not distorted, within the Community, it is essential to adopt measures to approximate the laws of member states and to create a directly applicable Community law."[124]

A directly applicable Community law can be achieved through the Council's adoption of regulations. One proposed regulation would give people the possibility of forming a European company, a "Societas Europea," that would be free of legal ties to any individual state. Another proposed regulation would establish a legal framework for joint ventures on specific projects. A Community legal environment would also be supported by various conventions. These include:

(1) Convention on jurisdiction and the enforcement of civil and commercial judgments;

(2) European Patent Convention;

(3) The 1968 Convention on the Mutual Recognition of Companies and Legal Persons. The United Kingdom, Ireland and Denmark have yet to accede;

(4) Draft convention on international mergers;

(5) Draft convention on the law applicable to contractual obligations;

(6) Draft convention on bankruptcy and winding-up arrangements.

There is also a proposed regulation to create a Community trademark and a Community Trademark Office, based on Article 235 EEC. This would be complemented by a directive harmonizing national laws on trademarks. Article 235 is of some interest:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

The Community legal environment would be fleshed out by directives harmonizing the laws of member states. Several directives have been adopted on various aspects of company law and others have been proposed. They generally fall under Article 54(3)(g) which seeks to safeguard the interests of investors, creditors, employees and others. One controversial area is the proposed fifth directive on company structure and administration, which provides for employee representation in the management of large companies.

Some brief information has already been given on the right of establishment as it applies to companies.[125] Directives facilitate the exercise of this right, which is given by Article 58. It is impossible in the Community to move a company's head office between states without dissolving the company. It is not legally clear whether this dissolution requirement contravenes Article 58. "The position will be clarified when the states ratify the 1968 Convention on Mutual Recognition of Companies and Legal Persons."[126] The convention tackles differences as to what constitutes the legal company seat. Meanwhile, creating a wholly-owned subsidiary or branch in another member state is easy, except that for some businesses, such as banks and insurance companies, there are special requirements.

The question of moving a company's head office is related to mergers. It is almost impossible to form a legal merger of two companies which have legal headquarters in different states. Only takeovers (economic mergers) are possible. The Commission is seeking to make legal mergers possible, with appropriate safeguards for all concerned, including employees.

The Commission's general program for the abolition of restrictions on freedom of establishment says a member state in which a company establishes itself is not entitled to demand that the company's board members, partners or shareholders shall be nationals of that state, provided the company shows a continuous and effective link with the state's economy.

Closely connected with the Community's work regarding commercial law and company law is the attempt to harmonize laws relating to the regulation of the securities industry.[127] The objective is to create an infrastructure for a common capital market. The approach is mainly through directives that establish minimum requirements; the states are left with the option of imposing more stringent requirements, provided they are not discriminatory.

Two directives have been established that should make it possible for a company domiciled in one member state to have its shares listed on any stock exchange in the Community. A third directive, in preparation, would require the publication at least twice a year of certain financial information. There are proposals for directives also on takeover bids, insider trading, open-ended investment companies (unit trusts), the canvassing of securities and other matters.[128]

The Commission was proposing to hold a symposium in November, 1980, to discuss the idea of a European stock exchange. There is also an attempt to link up the various national clearing systems to improve the handling of trans-national transactions. Several countries which use bearer rather than registered shares are already more or less interlinked. Italy is thinking of changing to bearer securities, but the United Kingdom and Ireland are expected to retain the registered kind. The idea of a European stock exchange was, to some extent, suggested by the Eurobond market which has a clearing system in Luxembourg.

- **Tax harmonization**

The tax provisions of the EEC treaty are contained in Articles 95 to 99. All but Article 99 are concerned with safeguards relating to the favouring of domestic products over the products of other member states. Reference has been made in an earlier section of this paper to the principal prohibitions against member states using internal taxation to discriminate in this way.[129]

Article 99 enjoins the Commission and the Council to harmonize the various forms of indirect taxation "in the interest of the common market."

A few years after the EEC Treaty was signed, the Neumark Report examined the degree of tax harmonization that would be necessary to achieve a common market.[130] A Commission official summarized the report's conclusions as follows:

> (1) for indirect taxes one needs a nearly identical tax system and tax rates;

(2) for corporate taxes one needs some harmonization of the tax structure and approximation of the tax rates;

(3) one need not worry too much about harmonizing the personal income tax system and rates.[131]

In the early days in the Commission there was a belief that tax harmonization might encourage economic integration. However, there followed a period of marked gains in the latter with relatively little progress in the former. The view now is that tax harmonization will follow rather than lead economic integration.

There have, however, been some important achievements in harmonizing the largest field of indirect taxation, turnover taxes. Excise taxes on some products, such as alcoholic drinks, have been a source of constant dispute among the states, but recently there has been progress there too. For direct taxation, achievements have been relatively modest, but work is proceeding on a number of important proposals. These three areas—turnover taxes, excise taxes, and direct taxes—will be examined in turn.

### (a) Turnover taxes

EEC states used to have "cascade" type sales taxes, under which taxes were paid without reference to the notion of "value-added" whenever goods changed hands. These taxes could and did result in some companies gaining competitive advantages. For example, one vertically-integrated car maker was able to obtain an advantage in three ways: over its domestic competitors who were not vertically integrated; over imports; and over its competitors in export markets. The Community agreed to replace cascade taxes with VAT. "VAT was adopted not because it has particular merits regarding free movement, but because it replaced a system that was inimical to free movement."

That was in 1973. It was not until 1977 that the Council adopted the important sixth directive on VAT, which established a uniform basis of assessment, and it was not until 1979 that the directive became effective in all states. The pressure for the adoption of the sixth directive came from the wish of the Community to appropriate fully for the Community's budget up to one per cent of the yield from VAT.[132] Further directives have been and will be necessary. For example, a directive proposed in 1980 would establish a single Community procedure covering exemptions from both VAT and excise taxes for the stores of vessels, aircraft and trains used in international transport.[133]

The reason why customs inspection still survives within the Community for ordinary travellers is the persistence of different VAT and excise rates. All countries have a standard VAT rate; the rate varies between 10 and 20.25 per cent. Some countries, however, have three rates, and others two or only one. France has a high rate of 33.33 per cent, a standard rate of 17.6 per cent, and a low rate of 7 per cent. The United Kingdom has a single (standard) rate of 15 per cent.

The "tax frontiers" which survive within the Community have obliged member states to seek one another's assistance to ensure that the proper tax rates are applied and the proper exemptions granted — a rather more complicated process than the co-operation among Canadian provinces regarding sales taxes. There is also a traveller's tax-free allowance.

The states are able, by a combination of VAT and excise rates, to vary the mix of their tax revenues in such a way as to tax more heavily products that are typically imported, without being overtly discriminatory. For example, Denmark produces no cars, so it levies heavy excise taxes on car sales. Locally-produced goods bear only VAT, with no or little excise added. Countries with more than one VAT rate can use VAT as well as excise in this fashion. The same sort of thing has happened on occasion with provincial sales taxes in Canada, but the sums involved are much smaller. Denmark's total tax on a car is about 200 per cent of its value at the time of importation.

### (b) Excise Taxes

In this field harmonization is negligible. Some states are said to have dozens of excise taxes. In 1972 and 1973 the Commission proposed a number of directives. "The basic proposal was a framework directive which provided that when tax frontiers were eliminated only five excise duties should be levied in the Community: on beer, wine, spirits, tobacco and mineral oils."[134]

The excise taxes on beer, wine and spirits have been particularly troublesome in Community trade. In February 1980 the Luxembourg court ruled that taxes levied by France, Italy, Denmark and Ireland discriminated against the products of other member states, in contravention of Article 95. In November 1980 a press report said there was some prospect of member states agreeing that excise taxes should be levied more or less in proportion to alcoholic content.

As is the case with many alcoholic drinks, the consumer price of cigarettes consists mostly of excise tax. In France, the tax is in proportion to the estimated value, whereas in Germany and the United Kingdom it is a specific amount according to quantity. Because French cigarette manufacturers benefit from using subsidized domestic tobacco, the base for the calculation of the tax on domestic cigarettes is lower than on imported cigarettes. Since the *ad valorem* rate is very high, the advantage of domestic manufacturers in paying less tax is considerable. In France, Marlborough cigarettes cost the consumer twice as much as Gauloises. There have been two Community directives, which have the effect of phasing out the advantage enjoyed by French cigarette manufacturers.

### (c) Direct taxes[135]

There is one directive, and a number of proposed directives. The directive already adopted facilitates mutual assistance between EEC tax authorities in the field of direct taxation. There is a comparable directive for VAT. Some countries adjacent to the EEC want to participate in the arrangements which "go beyond those usually included in bilateral tax agreements."

Two proposed directives were published in 1969 but have not been adopted. One concerns the fiscal treatment of dividends distributed by a subsidiary in one member state to its parent in another. There is as yet no agreement on what percentage holding of an enterprise constitutes a parent-subsidiary relationship. The other proposed directive concerns the fiscal treatment of cross-frontier mergers.

In the EEC there are two corporate tax systems. One is the "classical" system, used by the Netherlands and Luxembourg, which taxes corporate profits and an individual's receipt of dividends separately. The other is the "imputation" system, which allows a shareholder to offset, in the form of a tax credit, the whole or a part of the corporate tax paid against his own tax liability. This system is used by the other seven states; they each allow only a partial credit.

The Commission believes that the common market requires the adoption of a common structure for the corporate income tax, and it sees on balance some advantages in the imputation system. It also believes that the rates of corporate tax and tax credit should not vary too much from one state to another (it has suggested a specific band), and that a single rate of corporate tax should normally be applied in each country. The tax credit should be given by the state in which the recipient is subject to income tax but, unless bilateral agreements provide otherwise, at the budgetary cost of the state of the corporation which distributes the dividends. These proposals were embodied in a 1975 draft directive.

The European Parliament comments on draft directives. Without giving its official opinion on the 1975 draft just mentioned, it adopted in

May, 1979 a resolution to the effect that the proposals do not go far enough. It was particularly concerned that member states' rules for assessing companies' taxable profits be harmonized, e.g., regarding depreciation and the valuation of inventories; otherwise, to harmonize overall structures and rates would be to deal with only half of the problem. The Commission has proceeded to work on these ideas, and meanwhile the Council in 1979 began its examination of the whole question.[136]

Another important proposed directive, which was published in 1976, seeks to ensure that no double taxation takes place regarding the transfer of profits between associated enterprises located in different states. Double taxation could arise where taxation authorities in different states disagree about, say, the appropriate price level (and resulting profits), which should apply to components shipped from a parent to a subsidiary. Such double taxation "could distort conditions of competition and could affect capital movements and would be contrary to the concept of a common market."

The Commission proposes the establishment of a committee to deal with such problems. It would be composed of an equal number of representatives from each of the tax authorities concerned, together with an uneven number of persons "of standing" in no way related to the tax authorities. The committee would reach its decision by a majority vote, and the tax authorities would publish it only at their discretion.

The question of tax incentives calculated to attract industry to locate in particular states or development areas was considered in an earlier section of this paper.[137]

For personal income tax there is a proposed directive published in 1980 "affecting freedom of movement for workers." It is of particular importance for frontier workers: those workers who live in one state and work in another. The proposal is that a frontier worker should be taxed where he lives. However, the state where he works would be entitled to tax his income, this tax being credited against his tax liability in his country of residence. The worker would receive a refund from the residence country if any excess payment were involved.

A brief reference was made earlier in this paper, in the section on capital, to certain income tax measures that appear to contravene Article 67 of the EEC Treaty, which, with regard to capital, forbids "any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested." The German *Kuponsteuer* was introduced about 20 years ago when the authorities wanted to prevent foreign purchases of German bonds from adding to the upward pressure on the value of the mark. It is a withholding tax on bond interest and applies only to coupons collected by non-residents. The tax is still in place.

The French *avoir fiscal* and the Belgian *crédit d'impôt* "are reserved for resident shareholders and designed to preserve domestic savings for investment in domestic industry."[138] France recently announced a tax exemption for its residents on annual income, up to a certain maximum amount, derived from French stocks and bonds.

## MECHANISMS

The subject of Community mechanisms for decision, harmonization and enforcement, including the interplay between the various institutions, merits a separate study in itself, but the following paragraphs may be of interest to Canadians.

Because of the confederal nature of the Community, a great many things are left by the treaty to be harmonized by agreement among the governments of the member states, through their representatives on the Council of Ministers. Harmonization, both as provided in the treaty and in regulations or directives, is characterized by a certain amount of flexibility. This flexibility may, for example, take the form of phasing-in provisions or of discretion granted to the Commission in allowing or supervising derogations from the common rules.[139]

### The Commission's right of initiative and the Council's qualified majority

A common provision in the treaty is to have the Council act by a qualified majority on a proposal by the Commission.[140] For many matters the Council can act *only* on a proposal by the Commission, so that one sees here the notion of the separation of powers. The Commission's right of initiative is fundamental in bringing about harmonization. But the Council sometimes drags its feet. Decisions are usually deferred until unanimity is achieved, even where it is not required; and the more member states there are, the longer it is likely to take to achieve it.

### The court's anonymous majority

Each state has by convention one judge on the court. But the deliberations are secret and the decision collective, so that a state does not know how "its" judge ruled on any given case.

### Direct effect

Regulations, some treaty provisions and, less usually, directives have direct effect, that is, they create not only obligations between states but bestow rights on individuals and companies that can be enforced in national courts. This makes it easier to enforce the obligations of member states. For a provision to have direct effect it must meet certain criteria:

- the provision must be sufficiently clear and precise for judicial application
- it must establish an unconditional obligation
- the obligation must be "completed and legally perfect," and its implementation must not depend on measures being subsequently taken by Community institutions or member states with discretionary power in the matter.[141]

### Doctrine of the least restrictive remedy

The doctrine is applied by the Luxembourg Court, as it is by the U.S. courts when the "police power" is used by the states to impinge on freedom of movement. Measures which are permitted to impinge on this freedom, for good cause, must not do so more than necessary. That is, if a less restrictive measure will achieve the same end, it should be used.

### Advance notification and authorization

A common Community device is to require member states or individuals to notify the Commission of possible barriers to which the Commission may then object, usually within a given time limit. Examples are:

- Member states must notify the Commission of state aids to industry.
- Companies must notify the Commission of price-fixing arrangements.

An extension of this is to require not only notification, but prior authorization as well. Example:

> Companies must request authorization for the discharge of dangerous substances into the aquatic environment.

The direct effect of the procedural requirements regarding state aids is of particular interest (see earlier section of this paper). It means that affected individuals or firms may take member states to court if they ignore the notification requirements.

### Suing the Commission

The Commission may be taken to court for a number of things. For example, if it fails to advise member states of their treaty obligations any interested party may apply to the court under Article 175 for the infringement to be noted. Also, if it exceeds its authority the court may be asked to intervene. There have been successful appeals against the amount of a fine levied by the Commission in price-fixing cases. And Philip Morris Ltd. has sued the Commission for ruling that a particular state aid offered by the Dutch government is unacceptable.

### Directives

Directives, which usually require Council unanimity, are addressed to the states. The interesting thing about them is that they are binding on members as to the result to be achieved but not as to the method used to achieve the result. "Practices don't have to be uniform: they must only be compatible with the common market." States must inform the Commission of the steps taken. Individuals and companies dissatisfied with national implementation may ask the Commission to intervene. The Commission has a duty under Article 169 to advise the states of their failure to fulfil their treaty obligations, and ultimately it may take them to court.

Once adopted, a directive may be amended only in accordance with the procedure established by the treaty article under which it was made. Most directives are made under Article 100, which requires unanimous consent both for adoption and amendment.

### Reciprocal recognition of inspection and supervision

A common goal in harmonizing legislation is to get member states to agree that approval of a product (or supervision of, say, a financial company) by one state will be accepted by the others as meeting their own legal requirements. Sometimes a further rider is added, and this is the case with the proposed directive on unit trusts (open-ended investment companies). Once a unit trust had been approved by the state where it is located, it could operate throughout the Community, under the supervision of that member state. However, when marketing its units in another state, the unit trust would be subject to the marketing rules in force in that state.

### Harmonization: minimum, optional and total

Harmonization of legislation usually allows member states to impose more stringent standards, e.g., in securities regulation. However, they may not do so in the case of "total harmonization," which is typically used for certain technical standards.

Harmonization of technical standards can take one of two forms: total or optional. Total harmonization means that Community standards are the only ones in force. This is generally used for questions of health or safety, e.g., to ban the use of certain toxic substances in cosmetics. Optional harmonization means that Community standards must be accepted in all member states; but other standards, usually less stringent, may be used in local markets, and each government may refuse to accept the local standards of other states. It is not necessary to impose common standards on industrial goods or foodstuffs which are destined for local or regional use.

### Joint financing

Joint financing of a common policy, such as CAP, is believed to help ensure harmonization. Thus, the late Finn Gundelach, former EEC farm commissioner, said that joint financial responsibility for CAP was essential to preserve the free movement of goods within the Community. He was presumably making the point that there should be no separate financing by individual states, such as income supplements to their own farmers.

### Arbitration committee that includes outsiders

The committee proposal in the draft directive on double taxation would include, in addition to an even number of representatives from interested states, an uneven number of persons "of standing" having no connection with the tax authorities. Decisions would be taken by majority vote, but would be published only at the discretion of the member states.

### The Commission's staff as a pool of expertise

The fact that the Commission has a large staff from all member states and concentrated in one location has an important advantage: it serves as a vast pool of information and expertise on the law and practices of the member countries, a pool which is accessible by telephone to any staff member. The staff also serves as a vehicle for research and as a clearing house for ideas. Individual states occasionally adopt Commission proposals even though all states may not choose to do so.

### Symposium

The Commission will occasionally organize a symposium of experts to discuss a subject in respect of which it may wish to jog member states into action or just into thinking about a problem.

## NOTES TO TEXT

1. This section is based partly on the following sources:

- D. Wyatt and A. Dashwood, *The Substantive Law of the EEC* (London: Sweet and Maxwell, 1980), pt. 1.
- EEC Commission, *Uniting Europe: The European Community since 1950* (Brussels: EEC Commission, 1975).
- EEC Commission, *Steps to European Unity* (Luxembourg: EEC Commission, 1980).
- Price Waterhouse and Co., *Doing business in the European Communities* (New York, N.Y.: Price Waterhouse and Co., October 1978).

2. Wyatt and Dashwood, p. 4.

3. Ibid., p. 8.

4. Ibid., p. 20. For "Western European nation" one could, with even greater justification, substitute "Canadian province".

5. *Bulletin of the European Communities* (Price Waterhouse & Co.), supp. 1/76. See also supp. 5/75, containing the views of the Commission, and supp. 9/75.

6. *Steps to European Unity*, p. 56.

7. References here to "the treaty" mean the *Treaty of Rome* establishing the European Economic Community.

8. *Doing business in the European Communities*, p. 14.

9. *The Economist*, London, November 17, 1979, p. 63.

10. *Doing business in the European Communities*, p. 14.

11. *The Paris Treaty* establishing the ECSC, and the *Rome Treaties* establishing the EEC and Eurotom.

12. Wyatt and Dashwood, p. 96.

13. EEC Commission, "The Court of Justice of the European Communities", *European Documentation*, 1976/3.

14. For a discussion of this question, see Wyatt and Dashwood, pp. 31-32.

15. EEC Commission, "The European Community's budget", *European Documentation*, 1/79, p. 34. For an excellent examination of the possible wider purposes of the Community's budget see the *Report of the Study Group on the Role of Public Finance in European Integration* (Brussels: EEC Commission, 1977), more commonly known as *The MacDougall Report*.

16. The organization and most of the content of this section is derived from Wyatt and Dashwood, pt. 3, "The Free Movement of Goods", pp. 77-122. However, the authors' carefully qualified and detailed treatment has been simplified for the purposes of this paper.

17. Wyatt and Dashwood, pp. 100-102.

18. Wyatt and Dashwood, p. 91. The authors also note, in a footnote on p. 97, that the Spaak Report drew attention to the fact that the removal of barriers to imports makes Member States more interdependent and that it follows that there should be no restrictions on exports either, since Member States became dependent on supply sources.

19. See Wyatt and Dashwood, chapter 12.

20. Ibid., p. 84.

21. Quoted in Wyatt and Dashwood, p. 29.

22. Ibid. p. 99.

23. See Wyatt and Dashwood, pp. 99-104.

24. Ibid. pp. 102-103.

25. Ibid. pp. 104-105, and chapter 16, especially p. 219.

26. Wyatt and Dashwood, p. 106.

27. See later section of this paper.

28. EEC Commission "The removal of technical barriers to trade", *European File*, 12/79, June, 1979.

29. See the Commission's *Thirteenth General Report on the Activities of the European Communities*, 1979, (Brussels, February 1980) pp. 284-5.

30. Wyatt and Dashwood, p. 108.

31. Ibid. pp. 116, 117 and 119.

32. Ibid. pp. 113-114.

33. Ibid. p. 120.

34. This is subject to the treaty provisions relating to capital, notably those concerning the balance of payments. Article 54(e) enjoins the Council and Commission to enable migrants to purchase land and buildings, except where the protection of agriculture would be infringed.

35. Wyatt and Dashwood, p. 182.

36. Ibid., p. 186.

37. Ibid., p. 194.

38. Ibid. p. 202.

39. Ibid. p. 202. The quotation about the "ever closer union" is from the preamble to the treaty.

40. There are, however, attempts to harmonize laws in certain fields, such as in some aspects of education. See later section of this paper.

41. See Wyatt and Dashwood, pp. 195-199, and the later section of this paper on commercial and company law.

42. The content of this section is based entirely on Wyatt and Dashwood, Chapter 22. It should be noted that in Canada there are federal public undertakings which have no equivalent in the Community except at member state level.

43. See Wyatt and Dashwood, pp. 364-5.

44. Wyatt and Dashwood, p. 366.

45. Ibid. p. 369.

46. Ibid. p. 367.

47. Ibid. p. 368.

48. Ibid. p. 372.

49. Ibid. pp. 372-373.

50. Ibid. pp. 376-377.

51. Wyatt and Dashwood, footnote on p. 376.

52. *The Economist*, November 1, 1980, p. 50.

53. "The Court of Justice of the European Communities", *European Documentation* 1976/3, p. 19.

54. "Europe's Common Agricultural Policy", *European File* 9/79, Community's Publications, Luxembourg: May 1979, p. 3.

55. Wyatt and Dashwood, p. 251.

56. *The Economist*, November 1, 1980.

57. Britain introduced a monetary compensation amount of "plus 10.4 per cent", from November 3, 1980.

58. Wyatt and Dashwood, p. 203.

59. See *EEC Bulletins* No. 43 of May, 1979, No. 45 of October, 1979, and No. 46 of December, 1979, published by Price Waterhouse & Co. The first two digits of the number of a directive indicate the year of its adoption. Directives when adopted are published in the *Official Journal of the Community*, as are draft proposals when they have reached a certain stage.

60. *The Economist* of November 29, 1980, page 54, reported that the implementation of the directive is being blocked by some states.

61. EEC Bulletin 46, Price Waterhouse & Co.

62. See "Economic growth and energy conservation", *Euopean File* 16/79 of September, 1979: "New energy sources for the Community" *European File* 1980/2 of January-February, 1980; and *Doing Business in the European Communities*; Price Waterhouse & Co., October, 1979, page 79.

63. From the preamble to Council directive of 21 December, 1976, concerning public supply contracts.

64. Published in the *Official Journal of the European Communities* Volume 20, No. L13, 15 January, 1977.

65. Apparently the GATT Code has similar exemptions.

66. The directive exempts "contracting authorities" from the procedural requirements, not the good in question.

67. Wyatt and Dashwood, pp. 366-368.

68. Letter to *The Economist,* June 21, 1980, p. 6.

69. See the text of Article 36 EEC, reproduced earlier under the heading "Treaty provisions and their judicial interpretation: goods."

70. "The Community's industrial policy", *European File* 3/79, February 1979, p. 3.

71. "The removal of technical barriers to trade," *European File* 12/79, June 1979.

72. See *Euroforum*, No. 26/78 of July 4, 1978, Annex 2: "Directives for the free movement of goods."

73. See earlier section on "Treaty provisions and their judicial interpretation: goods."

74. The OECD is also active in this field, showing how such problems go beyond the borders even of such a large entity as the EEC.

75. *Thirteenth General Report on the Activities of the European Communities*, Brussels, February 1980, p. 76.

76. "The elimination of non-tariff barriers to intra-Community trade," *European Documentation*, 1976/2, p. 8.

77. Ibid. p. 15.

78. "Technical barriers to trade: new Commission approach," *Bulletin* EC1-1980, p. 13.

79. Ibid. p. 14

80. Ibid., pp. 14-15.

81. See "The common transport policy," *European File*, 20/79, November-December, 1979. Obstacles in the field of road transport are particularly severe, e.g. different regulations regarding vehicle dimensions and different forms of vehicle taxation.

82. Ibid. pp. 4-6.

83. Wyatt and Dashwood, p. 251.

84. See C.W.M. van Ballegooijen "Free movement of capital in the European Community," *Legal issues of European Integration*, 1976/2,

published by Kluwer, The Netherlands. Also see Price Waterhouse & Co., *EEC Bulletins* No. 20 of December 1975 and No. 36 of April 1978.

85. For provisions against obstacles see Articles 3(c), 67(1), 68 to 73, 54(3)(e) and 106. Foreign exchange restrictions are permitted under Articles 73, 108 and 109.

86. *The Economist*, December 6, 1930, p. 67.

87. See later section of this paper entitled "Tax harmonization."

88. See Wyatt and Dashwood, Part IV.

89. Ibid. p. 126.

90. See Wyatt and Dashwood, Chapter 13. All quotations in this section are from that source.

91. See earlier section of this paper entitled "Treaty provisions and their interpretation: services."

92. Reciprocity is not, however, a normal Community principle.

93. Wyatt and Dashwood, page 193.

94. Ibid. p. 161.

95. Ibid. p. 128.

96. Wyatt and Dashwood (p. 248.) The whole of Part VI of the book, some 100 pages, contains a detailed examination of EEC competition rules and policy.

97. "European competition policy," *European File* 14/19, July-August 1979.

98. Wyatt and Dashwood, p. 248.

99. Ibid. p. 259. See also pp. 282-284 and p. 319 on the question of distinguishing between Community and national jurisdiction, e.g. when a national law prohibits a practice which is exempted from prohibition by the Commission.

100. *European File*, 14/79, July-August, 1979.

101. The European Community and Consumers", *European File* 13/79, of July-August 1979, p. 3.

102. See EEC Bulletin No. 45, October 1979, Price Waterhouse & Co. and *European File* 13/79. Bulletin No. 46 of December 1979, pages 13/14, contains a list of existing and proposed directives.

103. The principal source of these notes is "Towards a European education policy," *European Documentation*, 1988/2, and press reports.

104. "The European Community and Education," *European File* 18/79, October 1979, p. 2.

105. Implemented by a Council directive of July 25, 1977, (77/486/EEC).

106. See Wyatt and Dashwood, Chapter 20, on which these notes are based.

107. Ibid. p. 323.

108. Ibid. p. 324.

109. Ibid. p. 329.

110. See "The Community's industrial policy," *European File* 3/79, February 1979.

111. For a fuller description of the criteria that the Commission applies to sectoral aids, see Wyatt and Dashwood, pp. 336-337.

112. "Regional development and the European Community", *European File* 10/79, May 1979, p. 7.

113. *The Economist*, December 6, 1980, p. 56.

114. "Regional development and the European Community," *European File* 10/79, May 1979, p. 5.

115. Ibid. p. 3.

116. Wyatt and Dashwood, pp. 337-338.

117. *Thirteenth General Report on the Activities of the European Communities*, 1979, Brussels, February 1980, p. 59.

118. Wyatt and Dashwood, pp. 335-336.

119. *Thirteenth General Report*, p. 102.

120. "The European Community and the environment", *European File* 4/79, February, 1979. See also "The European Community and Water," *European File* 6/80, April 1980.

121. "The European Community's Competition Policy," *European Documentation*, 1976/4, p. 20.

122. See "The European Monetary System," *European File* 7/79, April 1979, which is the source of these notes and the quotations in this section.

123. See "Company law harmonisation" in *Doing business in the European Communities*, Price Waterhouse & Co., October 1978; "Harmonisation status report on company law and business related subjects", *EEC Bulletin No. 46* of December 1979, Price Waterhouse & Co.; and the Commission's *Thirteenth General Report*, February 1980, pp. 78-82.

124. *Thirteenth General Report*, p. 78. The word "approximate" is the Community's term for "harmonize."

125. See earlier section of this paper entitled "Treaty provisions and their interpretation: services."

126. Wyatt and Dashwood, p. 197.

127. For a detailed study of the subject see E. Wymeersch, *Control of securities markets in the European Economic Community*, published by the Commission of the European Communities, Brussels-Luxembourg, 1978.

128. See *EEC Bulletin No. 46*, Price Waterhouse & Co., and *Thirteenth General Report*, pp. 106-107.

129. See "Treaty provisions and their interpretation: goods."

130. Dr. Fritz Neumark, *Rapport du Comité Fiscal et Financier*, CEE, 1962. See also Volume 1 and 2 of the *MacDougall Report: Report of the Study Group on the Role of Public Finance in European Integration*, Brussels, April 1977.

131. In Canada, people move more easily between provinces than people in the EEC move between member states, so the harmonization of the personal income tax would be of more concern here. Also there are in Canada both federal and provincial tax laws, and a need to harmonize the provisions of both levels, a complication which is absent in the Community, where there is no personal income tax at the Community level.

132. See earlier section of this paper entitled "A Description of the Community."

133. Price Waterhouse's *EEC Bulletin No. 47* of March 1980, contains a most useful review of tax harmonization in the EEC. Existing and proposed directives are summarized.

134. Price Waterhouse's *EEC Bulletin No. 47*. Mineral oils subject to excise tax are presumably those used for fuel.

135. See Price Waterhouse's *EEC Bulletin No. 47*, which is the principal source for these notes.

136. See Price Waterhouse's *EEC Bulletin No. 47*, and the Commission's *Thirteenth General Report*, p. 109.

See "State aids to industry, and regional development".

138. C.W.M. van Bellegooijen, "Free movement of capital in the European Economic Community," *Legal Issues of European Integration 1976/2*, published by Kluwer, The Netherlands, page 10.

139. See, for example, Article 80(1)EEC which allows the Commission to authorize discriminatory transport rates. Article 93 regarding state aids is an outstanding example of flexible supervision provisions.

140. For an explanation of the qualified majority see the section of this paper entitled "A Description of the Community."

141. Wyatt and Dashwood, pp. 27-28.